Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ARNOLD PAUL PROSPERI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Federal Rule of Evidence 606(b), which prohibits jurors from testifying about their deliberative processes "[u]pon an inquiry into the validity of a *verdict*," prevents a district court from conducting an inquiry into juror misconduct that comes to light before a verdict has been returned.

2. Whether, consistent with *Allen v. United States*, 164 U.S. 492 (1896), and its progeny, a trial court faced with a deadlocked jury may instruct that jury to continue its deliberations without taking any other action to ensure that jurors who favor acquittal will not surrender their conscientiously-held beliefs.

3. Whether a conviction under the federal counterfeiting statute, 18 U.S.C. § 513(a), can be sustained absent a showing that the counterfeited obligation is similar to a genuine obligation.

PARTIES TO THE PROCEEDINGS

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Arnold Paul Prosperi respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 201 F.3d 1335. The order of the district court granting a judgment of acquittal on the counterfeiting counts (App., *infra*, 24a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2000. A timely petition for rehearing was denied on March 30, 2000. App., *infra*, 43a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTE, AND FEDERAL RULE INVOLVED

The Fifth and Sixth Amendments to the Constitution of the United States, 18 U.S.C. § 513, and Federal Rule of Evidence 606 are reproduced at App., *infra*, 44a-47a.

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts of filing false tax returns, 26 U.S.C. § 7206(1), and on three counts of "mak[ing], utter[ing], or possess[ing]" counterfeited securities in violation of 18 U.S.C. § 513(a). The district court granted petitioner's post-trial motion for judgment of acquittal on the counterfeiting charges. The court of appeals affirmed petitioner's conviction on the tax counts and, on the Government's cross-appeal, reinstated the convictions on the counterfeiting counts.

1. In 1979, petitioner Arnold Paul Prosperi, a real estate attorney in West Palm Beach, Florida, was introduced to Patrick Donovan, a citizen of the Republic of Ireland. Donovan, a wealthy, retired businessman with bank accounts in the Channel Islands, Liechtenstein, and Switzerland, wanted to make real estate investments in the United States. Donovan advised Prosperi that his investments in the United States were to be kept secret, and he authorized Prosperi to establish an offshore corporation as an investment vehicle in order to assure complete anonymity. App., *infra*, 2a.

Pursuant to Donovan's instructions, Prosperi created Amaretto Corporation ("Amaretto"). Prosperi also obtained and held from the very inception of the corporation, with Donovan's written consent, a power of attorney that authorized Prosperi to act for Amaretto in all of its business affairs. That instrument authorized Prosperi to "do and perform any and all acts and deeds whatsoever as [he] shall consider proper and expedient in the management, supervision, and conduct" of Amaretto's business, and included the authority to buy and sell real estate and to make and recall loans. Tr. 3303-08. Prosperi managed the affairs of Amaretto pursuant to that power of attorney, for the benefit of Patrick Donovan, from 1979 through 1995. App., *infra*, 2a.

During the 1980s, Prosperi participated in two major real estate transactions on behalf of Amaretto. The first involved the 1985 purchase, renovation, and subsequent sale of residential property at 143 East Inlet Drive in Palm Beach, Florida ("the Inlet property"). Donovan and Prosperi agreed to purchase the Inlet property as partners. Under the terms of their arrangement, Amaretto paid 50% of the purchase price and loaned Prosperi money to purchase the other 50% share. Tr. at 3321-22. Once Prosperi paid off the loan, and Amaretto was paid a return on its investment, all profits from the sale of the Inlet Drive property were to be divided equally between Amaretto and Prosperi. App., *infra*, 2a.

The second transaction involved the purchase and subsequent sale of a golf course owned by Amaretto to the United States Department of Veterans Affairs ("the Holigolf transaction"). Acting for Amaretto, and in consultation with Donovan, Prosperi closed the sale of the golf course in 1989 after years of painstaking negotiation. Tr. 3391-99. The sale proceeds of $3,050,000 were deposited into an Amaretto Citicorp savings account. Prosperi, exercising the authority vested in him by the power of attorney, withdrew $50,000 as a fee for his work on the transaction. App., *infra*, 3a n.1. Prosperi also withdrew additional funds from the Amaretto account and deposited them into his own accounts. Prosperi testified at trial that the money was a loan from Amaretto to him, intended to finance other real estate transactions, and that Donovan had authorized the loan, as he had done with respect to the loan used to purchase Prosperi's 50% interest in the Inlet property. Tr. 3451-52.

2. In June 1994, the criminal division of the Internal Revenue Service ("IRS") opened an investigation into Amaretto as a result of Amaretto's failure to pay withholding taxes on the sale proceeds from the Holigolf transaction. Tr. 141-42. Although the IRS ultimately concluded that Amaretto had no obligation to withhold taxes on that transaction, agents came to suspect during the investigation that Prosperi was diverting funds from Amaretto for his own use. Agents interviewed Prosperi about the tax aspects of the Holigolf transaction and about the Amaretto funds Prosperi had transferred into his accounts. Prosperi cooperated with the IRS investigation and told agents that the monies he withdrew from the Amaretto account were loans from Amaretto that had been approved by Amaretto's beneficial owner. Tr. 165, 3630-45.

The IRS eventually discovered that Donovan was the beneficial owner of Amaretto, and agents contacted him to discuss the tax dimensions of the Holigolf transaction. At first Donovan denied his relationship with Amaretto, but he subsequently admitted owning the corporation. Donovan

told the IRS that he had been completely unaware of the loans Amaretto had made to Prosperi, and he promised to cooperate with the agents' investigation. App., *infra*, 3a. Donovan ultimately produced to the Government counterfeit securities and falsified bank statements that Prosperi purportedly had given to him, as well as tapes of certain of his phone conversations with Prosperi about the status of the IRS investigation into Amaretto and the monies Prosperi had withdrawn from the Amaretto accounts. At no time during the investigation did Donovan disclose to the IRS that he had not paid personal or corporate income taxes in Ireland for over 20 years, that he concealed funds from Irish tax authorities by maintaining accounts under different names in foreign countries, or that his interest in purportedly aiding United States authorities stemmed from his grave concern that the IRS investigation into Amaretto might spark a parallel tax investigation into his holdings by Irish authorities, a danger that he hoped to minimize by disavowing actions taken by Prosperi on his behalf. Tr. 505-28, 562-94.

3. In September 1996, a grand jury indicted Prosperi on two counts of mail fraud, 18 U.S.C. § 1341 (Counts 1 and 2); three counts of counterfeiting securities, 18 U.S.C. § 513 (Counts 3, 4, and 5); eight counts of money laundering 18 U.S.C. §§ 1956-57 (Counts 6, 7, 8, 9, 10, 11, 12, and 13); and two counts of filing false tax returns, 18 U.S.C. § 7206(1) (Counts 14 and 15). In June 1997, the indictment was superseded to revise the money laundering counts and to add a forfeiture count (Count 16).

The indictment alleged that Prosperi misappropriated proceeds from the Holigolf transaction while advising Donovan that the funds were invested in certificates of deposit ("CDs"). Relying on the documents produced by Donovan, the indictment further alleged that Prosperi created false documents purporting to be CDs issued by the J.P. Morgan bank and Morgan Guaranty Trust, and that he had shown those documents to Donovan to conceal his deceit.

The tax counts charged Prosperi with failing to report the monies he allegedly stole from Amaretto on his 1989 and 1990 federal income tax returns. App., *infra*, 3a-4a.

The case proceeded to trial in September 1997. The Government's case rested largely on Donovan's testimony. Donovan testified that he was unaware that loans had been made from Amaretto to Prosperi, and that Prosperi had presented him with various counterfeit obligations during their annual meetings. *Id.* at 4a. On cross-examination, Donovan conceded that he had voluntarily formed a partnership with, and loaned money to, Prosperi in connection with the purchase and sale of the Inlet property; that he had lied to law enforcement agents about his involvement with Amaretto out of fear that his tax fraud would be exposed to Irish authorities; that he owed at least $4 million in unpaid taxes to the Irish Government; and that IRS agents had suggested they might protect him from an investigation in Ireland. Tr. 622-27, 681-707, 749-52. Donovan was also forced to concede that he did not produce the counterfeit instruments to law enforcement agents until some five months after he first decided to "cooperate" with them, and that it was not until three days before Prosperi's trial that he disclosed to the United States Attorney his massive tax liabilities in Ireland. Tr. 737-44, 775-77. The prosecutor acknowledged in summation that his star witness was "no angel[.]" Tr. 4671.

Prosperi testified in his defense that Donovan had consented to the loans he had taken from Amaretto and that Donovan in fact had encouraged Prosperi to hold properties and other assets in Prosperi's name in order to protect the secrecy of Donovan's investments in the United States. Tr. 3288-89, 3306. Prosperi also testified that he did not create the counterfeit obligations that had been produced to the U.S. authorities by Donovan and contended that Donovan had manufactured them in an effort to deflect attention from his *own* tax machinations and liabilities in Ireland while he tried

to negotiate a settlement of his tax liabilities with Irish authorities. Tr. 3740-43, 4708-12.

4. At the close of the evidence, the district court granted Prosperi's motion for judgment of acquittal on 10 of the 15 counts in the indictment: the mail fraud counts (Counts 1-2), and the money laundering counts (Counts 6-13). The district court concluded that the Government had failed to prove that the mailings charged in the indictment furthered the purportedly fraudulent scheme Prosperi was said to have orchestrated. The counterfeiting (Counts 3-5) and tax fraud (Counts 14-15) counts relating to the Holigolf transaction were the *only* charges submitted to the jury. App., *infra*, 4a.

In the evening of the second day of deliberations, Bonnie Huffman, a dismissed alternate juror, contacted defense counsel and reported that juror Morris Levy had predetermined Prosperi's guilt and had engineered the election of a like-minded juror as foreperson well before the close of the evidence. *Id.* at 5a. Huffman also informed defense counsel that juror Marilyn Budd had called her in tears, complaining that Levy was attempting to coerce her into voting for a conviction. Huffman reported that the jury was split 10-2 in favor of conviction, with Budd and another juror favoring acquittal. *Id.* at 50a.

Defense counsel apprised the district court of these developments during deliberations and requested that the court conduct a hearing into the reported juror misconduct. The district court determined that, under Federal Rule of Evidence 606(b), it had no authority to conduct a hearing, stating "[t]he only thing that I can really consider under Rule 606(b) is an outside influence and . . . this doesn't involve outside influence." *Id.* at 67a. The district court reminded the jurors to discuss the case only among themselves.

During a recess later that morning, defense counsel observed juror Budd crying outside the courtroom. App., *infra*, 55a. Defense counsel immediately apprised the district court of what he had seen and requested that the district court remind the jurors of their right during deliberations to adhere

to their honestly-held convictions. The district court denied that request, stating that further instruction would be necessary only if "I get a note from the jury that says they are deadlocked or need further instruction." *Id.* at 56a.

That same day, the jury sent three notes to the trial judge. The first requested a read-back of Prosperi's testimony regarding "loan" notations that Prosperi had made on certain of Amaretto's documents. *Id.* at 57a. The second question asked "is there a legal definition relating to the tax returns for the concept of a loan." *Id.* at 62a. Both notes reflected the jury's focus on the central issue raised by the tax counts. As the district court instructed the jury, loans are not taxable income and are not required to be reported on federal income tax statements. Thus, if the jury were to find that the monies transferred from the Holigolf transaction to Prosperi were loans, it would be obliged to acquit Prosperi on those charges.

Shortly after the district court responded to those requests, the jury sent out a third note. That note indicated that a verdict had been reached on the counterfeiting counts (Counts 3, 4, and 5), but that the jury was unable to reach a verdict on the tax counts (Counts 14 and 15), and could see no likelihood of a "change in the near future." App., *infra*, 64a-65a. Over defense counsel's objection, the district court instructed the jury as follows: "Members of the jury, please continue to deliberate on counts 14 and 15." *Id.* at 65a. No instruction regarding the jurors' right and duty to adhere to their honestly-held convictions was given, even though the district court was aware that two jurors had been holding out for an outright acquittal. *Id.* at 50a.

Following that instruction, and during a court recess, two witnesses informed defense counsel that they saw juror Levy take juror Budd aside and that the two engaged in a heated disagreement away from the other jurors. *Id.* at 67a. Defense counsel again apprised the trial judge of these reports and proffered that he now could establish, through two independent witnesses, a "prima facie case . . . that jurors

are violating the court's instructions." *Ibid.* Defense counsel *again* requested that the district court conduct an inquiry and *again* the district court denied the request, invoking Rule 606(b). *Ibid.*

The next morning—now the third day of deliberations—the prosecutor requested that the district court interview Huffman, the dismissed alternate, regarding her conversations with juror Budd. The prosecutor stated that Huffman's statement *to* Budd constituted a potential "extraneous" taint warranting investigation, but reasserted the Government's view that Huffman's reports of jury coercion were not proper subjects of inquiry. App., *infra*, 71a. Defense counsel requested that the district court examine Huffman regarding Budd's account of intimidation in the jury room to ascertain whether the reports of juror misconduct were credible. *Id.* at 80a. Relying on Rule 606(b), the district court refused to question Huffman on any topic other than what Huffman told Budd. *Ibid.* Huffman testified only that she had told Budd to "stick by what you believe in." *Id.* at 78a.

5. The jury returned a guilty verdict on all counts. Prosperi filed a motion for a judgment of acquittal on the counterfeiting counts on the ground that the Government did not prove that the J.P. Morgan CDs that Prosperi purportedly gave to Donovan bore a sufficient resemblance to genuine CDs in order to qualify as "counterfeited" within the meaning of 18 U.S.C. § 513. The district court granted the motion and entered an order granting acquittal as to Counts 3-5. App., *infra*, 24a-42a.

The district court observed that the legislative history of section 513 plainly evidenced Congress's intent to incorporate the "similitude" requirement that applied to counterfeiting offenses at common law. Under that standard, the district court explained, 18 U.S.C. § 513(a) mandated proof of physical resemblance between the counterfeit and genuine obligations. *Id.* at 33a. The Government did not carry its burden of proof on that point, the district court

concluded, because the jury was "not provided [with] a valid CD with which to compare the phony." *Id.* at 38a.

6. The court of appeals affirmed Prosperi's tax convictions and, on the Government's cross-appeal, reversed the district court's judgment of acquittal on the counterfeiting counts. App. *infra*, 1a-23a.

Like the district court, the court of appeals analyzed the juror-misconduct claim under Fed. R. Evid. 606(b). The court of appeals believed that Rule 606(b) grants district courts "discretion" to investigate claims of juror misconduct, but suggested that such discretion does not extend to "allegations of internal influence occurring during deliberations." *Id.* at 7a. Thus, while the district court correctly "investigated the possibility of *external* influence *by* the excused alternate" (*ibid.*; emphasis added), the court of appeals concluded that the district court could not possibly abuse its discretion in failing to investigate reports of premature deliberations, prejudgment of the accused's guilt, and coercion because those instances of "juror misconduct . . . were entirely endemic to the deliberations." *Ibid.* Indeed, the court of appeals believed *any* investigation by the district court in those circumstances would "have invited reversible error." *Ibid.*, *citing United States v. Norton*, 867 F.2d 1354, 1366 (11th Cir. 1989).

The court of appeals also rejected Prosperi's contention that the instruction to the jury to "continue to deliberate" constituted reversible error. Prosperi contended that the supplemental charge was a truncated "*Allen*" charge that lacked the requisite admonition that jurors should not compromise their conscientiously-held views simply to secure a verdict. *See Allen v. United States*, 164 U.S. 492 (1896). The court of appeals explained that the instruction was not an *Allen* charge but rather a simple "request" that the jury continue deliberating, and held that the charge was not "inherently coercive" because the trial court was "unaware of the composition of the jury's nascent verdict" and the charge

did not suggest that "a particular outcome was either desired or required." App., *infra*, 8a.[1]

Finally, the court of appeals held that in enacting section 513 Congress broke from the common law tradition by defining the term "counterfeited" in the statute. That statutory definition, the court of appeals opined, did not contain a similitude requirement and was unambiguous on its face, making reference to the legislative history, upon which the district court had relied, or to other federal counterfeiting statutes, which do impose a similitude requirement, unnecessary. *Id.* at 12a.

REASONS FOR GRANTING THE WRIT

This petition presents three important and recurring issues critical to the proper administration of the criminal justice system. Those issues are: (1) the degree to which a district court is prohibited by Federal Rule of Evidence 606(b) from investigating jury irregularities *before* a verdict has been returned; (2) the propriety under the federal constitution as well as under this Court's supervisory authority of a supplemental charge to a deadlocked jury that omits some admonition intended to assure that jurors who favor acquittal will not relinquish their honestly-held convictions solely to achieve a verdict; and (3) whether the federal counterfeiting statute, 18 U.S.C. § 513(a), requires proof of the "similitude" between the genuine and counterfeit obligation. The Eleventh Circuit's ruling on the first two issues squarely conflicts with the decisions of other courts of appeals, and, as the Eleventh Circuit conceded, its ruling on the "similitude" question departs from the rule followed by "virtually every court of appeals" (App., *infra*, 10a) with respect to

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[1] In making that determination, the court of appeals apparently overlooked Huffman's report that the jury was divided 10-2 in favor of conviction before the jury reported it had reached an impasse. App., *infra*, 50a.

counterfeiting offenses. Plenary review is therefore warranted.

I. The Federal Courts Of Appeals Are Divided Regarding The Scope Of Federal Rule Of Evidence 606(b)

The court of appeals upheld the district court's conclusion that it lacked discretion under Rule 606(b) to conduct a preverdict hearing on the allegations of "internal" juror misconduct. That decision contradicts the text and purpose of Rule 606(b), conflicts with the decisions of other courts of appeals, and needlessly restricts the scope of a district court's authority to investigate credible allegations of serious jury irregularities during trial. Review by this Court is essential to restore clarity to this important area of federal criminal procedure.

1. By its terms, Federal Rule of Evidence 606(b) forbids jurors from testifying as to what occurred during their deliberations in the event there is "an inquiry into the validity of [the] verdict." Fed. R. Evid. 606(b). The Rule "is grounded in the common-law rule against admission of juror testimony to impeach a verdict" (*Tanner v. United States*, 483 U.S. 107, 121 (1987)) and, like the common law rule, Rule 606(b) provides that a juror may nonetheless testify on the narrow question "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Fed. R. Evid 606(b); *see also Tanner*, 483 U.S. at 121. Thus, in situations to which it applies, Rule 606(b) draws a sharp distinction between influences intrinsic to the deliberation process and "outside" or "external" influences that may have affected that process. "Upon an inquiry into the validity of a verdict" (Fed. R. Evid. 606(b)), only the latter types of influence may be examined by the courts.

By holding that Rule 606(b) provides the appropriate framework for investigating *pre-verdict* claims of juror misconduct, the Eleventh Circuit imported into the analysis of

such claims the dichotomy between "external" and "internal" influences that Rule 606(b) prescribes; indeed, the Eleventh Circuit opined that a district court ordinarily would *err* if it elects to investigate any pre-verdict allegation of improper "internal" influences. Most courts of appeals that have considered the question, however, hold that Rule 606(b) does not impose *any* limitation on a district court's discretion to investigate irregularities—of either the "external" *or* "internal" variety—in the jury's deliberations that come to light *before* a verdict has been returned. Indeed, several courts of appeals rule on such claims without even adverting to Rule 606(b), correctly recognizing that the rule has no bearing on the question. *See, e.g.*, *United States v. Rowe*, 144 F.3d 15, 19-20 (1st Cir. 1998) (allegations of juror bias raised during deliberations); *United States v. Abrams*, 137 F.3d 704, 708 (2d Cir. 1998) (allegations of premature deliberation raised during trial); *United States v. Beard*, 161 F.3d 1190, 1193-94 (9th Cir. 1998) (allegations of juror intimidation raised during deliberations).

Several courts of appeals have also expressly rebuffed the Government's attempt to invoke Rule 606(b) as a bar to investigation of juror misconduct that comes to light before a verdict has been returned. In *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993), for example, the Third Circuit held that a new trial was required where the district court failed adequately to investigate "internal" misconduct that was discovered during trial. In *Resko*, a member of the jury told a court official on the seventh day of a nine-day trial that jury members had been discussing the case during recesses and while waiting in the jury room. *Id.* at 686. Resko moved for an individualized *voir dire* of the jury, and the district court directed jurors to answer a questionnaire that sought to ascertain the degree to which each had engaged in premature deliberation. *Ibid.* Every juror admitted to having done so, but the questionnaire did not request the jurors to disclose the topics they had discussed or the length of their conversations. *Ibid.* The district court concluded without further

investigation that the misconduct had not prejudiced Resko and his co-defendant. *Id.* at 690.

The Third Circuit reversed and ordered a new trial, holding that the district court did not have "enough information to make a reasoned determination that the defendants would suffer no prejudice due to the jury misconduct." *Id.* at 691. Explaining that "it is far easier for a district court to address allegations of jury misconduct when they come to light mid-trial rather than after the verdict has been entered," *id.* at 694, the Third Circuit held that Rule 606(b) does *not* limit a district court's ability to conduct a thorough investigation of the reported irregularities:

> [T]here is a doctrinal distinction between those situations in which evidence of intra-jury misconduct comes to light during trial and those situations in which such evidence is discovered only after the verdict has been entered. In the latter context, Fed. R. Evid. 606(b) prohibits a juror from testifying about such intra-jury influences *although it imposes no such proscription before the verdict has been entered.*

Id. at n.9 (emphasis added); *see also United States v. Bertoli*, 40 F.3d 1384, 1395 n.5 (3d Cir. 1994) (noting trial court erred in construing Rule 606(b) as a bar to investigating juror misconduct because "the court was not inquiring into the validity of a verdict").

The Fifth Circuit reached a similar conclusion in *United States v. Sotelo*, 97 F.3d 782 (5th Cir. 1996), where it held that Rule 606(b) does not restrict a district court's discretion to investigate "intrinsic" juror misconduct before a verdict has been returned. In *Sotelo,* a juror stepped out of the jury room during deliberations and informed the court security officer that she was upset by racial remarks made by some of the other jurors. After conferring with the parties, the district court brought the entire jury into the courtroom and questioned the offended juror about her allegations. *See id.* at 795-96. In reviewing the propriety of the district court's investigation into the reports of misconduct, the court of

appeals noted that "[f]ocus on the briefs on Rule 606(b) is misplaced." *Id.* at 797. "Since the problem was brought to the court's attention prior to verdict," the Fifth Circuit explained, "606(b) does not impact the availability of juror testimony in resolving the factual issues raised . . . . and [does not help] resolve the real issue in this case which was brought to the court's attention pre-verdict." *Ibid.*

The Seventh Circuit also has held that Rule 606(b) does not apply to allegations of juror misconduct raised during trial. In *United States v. Sababu*, 891 F.2d 1308, 1333 (7th Cir. 1989), the Seventh Circuit held that the district court erred in relying on Rule 606(b) in refusing to conduct a *voir dire* of the jury about a transcript that was not admitted into evidence but was mistakenly placed in the exhibit binders sent to the jury room. The Seventh Circuit reasoned that "the judge was requested to question the jurors *during* their deliberations and *before* they reached a verdict." *Id.* at 1335 (emphasis in original). "In such a situation," the court of appeals observed, "the Rule is *inoperative* and the trial judge was not restricted by it from conducting a *voir dire* of the jury as to the effect of the transcript on the deliberations." *Ibid.* (emphasis added); *see also United States v. Stafford*, 136 F.3d 1109, 1113 (7th Cir. 1998) (noting that request to investigate intra-juror misconduct should have been made before verdict was returned; under Rule 606(b), the request made post-verdict came "too late"); *United States v. Bruscino*, 687 F.2d 938, 941 (7th Cir. 1982) (Rule 606(b) prohibits district court from "questioning the jurors, *after* they have given their verdict, to determine whether their deliberations were prejudiced") (emphasis added).

By contrast, the Sixth and Tenth Circuits, like the Eleventh Circuit in this case, believe that Rule 606(b) provides the correct framework for analyzing misconduct issues that come to light before there is a verdict. In *United States v. Herndon*, 156 F.3d 629 (6th Cir. 1998), the Sixth Circuit held that a district court abused its discretion in failing adequately to investigate a juror who recollected

during deliberations that he may have had prior business dealings with the defendant. *Id.* at 634. In reversing the defendant's conviction, however, the Sixth Circuit analyzed the propriety of the district court's limited investigation under the rubric of Rule 606(b) jurisprudence, engaging in an extensive analysis of whether past associations are properly characterized as "internal" or "external" influences. Similarly, the Tenth Circuit has explained that in responding to allegations of "internal" misconduct raised during deliberations, "[i]nquiry into such matters, *within the limitations of Fed. R. Evid. 606(b)* . . . is the appropriate method" to address them. *United States v. Davis*, 1 F.3d 1014, 1016 (10th Cir. 1993) (emphasis added).

The Eleventh Circuit's decision thus exacerbates the substantial conflict in the courts of appeals. The district court repeatedly invoked Rule 606(b) as a bar to *any* investigation of the "internal" misconduct that was brought to its attention, even though the allegations of misconduct were reported to it well before any verdict had been returned. In the Third, Fifth, and Seventh Circuits, Rule 606(b) would pose no barrier to investigation of those allegations, while in the Sixth, Tenth, and now the Eleventh Circuits, the district court would find itself without *any* authority to interrogate jurors about the scope of the misconduct and its prejudicial effect. That division of authority on so important an issue of federal criminal procedure warrants this Court's immediate review.

2. The Eleventh Circuit's decision not only frustrates a key policy goal of Rule 606(b), but also gives short shrift to the trial courts' overriding duty to ensure the observance of due process protections. Congress enacted Rule 606(b) with the clear expectation that judicial investigation into reported intra-juror misconduct would proceed unfettered by the dictates of the Rule. The legislative history provides ample evidence in support of that point. As passed by the House, Rule 606(b) deemed a broad range of juror testimony admissible. *Tanner*, 483 U.S. at 122-25. The Conference

rejected the House bill, but in doing so made clear that the Rule's limitation on post-verdict investigation into trial irregularity should be counterbalanced by encouraging jurors "to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations." *See* Advisory Committee's Notes to Subdivision (b), Fed. R. Evid. 606(b). Thus, "the legislative history demonstrates with uncommon clarity," *Tanner*, 483 U.S. at 125, that Congress expected prompt reporting by jurors, in conjunction with prompt investigation by judges, to assure that fair and regular trial procedures would be observed.[2]

Observance of such procedures—including prompt judicial inquiry into credible allegations of *ongoing* jury misconduct—is far more than a procedural nicety; it is a fundamental requirement of due process.[3] Yet under the Eleventh Circuit's expansive interpretation of Rule 606(b), a district court faced with credible reports that deliberating jurors are drinking alcohol, smoking marijuana, and ingesting cocaine—all of which constitute "internal" misconduct, *see Tanner*, 483 U.S. at 125—would be barred by that rule from

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[2] Even the common law authorities on which Rule 606(b) was based maintained that "[t]he reasons for the . . . rule . . . disappear . . . if such investigation . . . is *made by the judge* and takes place *before the jurors' discharge* and separation." 8 WIGMORE ON EVIDENCE § 2350 at 691 (1961) (emphasis in original). Such an investigation would serve only to remedy "aberrations in the verdict before it has become a recorded finality[.]" *Ibid.*

[3] *See Smith v. Phillips*, 455 U.S. 209, 217 (1981) ("Due process means a jury capable and willing to decide the case solely on the evidence before it, *and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.*") (emphasis added); *see also United States v. Olano*, 507 U.S. 725, 738 (1993) (same); *Rushen v. Spain*, 464 U.S. 114, 127 (1983) (Stevens, J., concurring) (noting that a criminal defendant has a due process right to a "mid-trial hearing" when credible allegations of jury partiality are raised).

investigating those allegations, because they relate to misconduct that is "entirely endemic to the deliberations." App., *infra*, 7a. A district court similarly would be precluded from investigating allegations of ongoing coercion or other physical abuse, racial bias, mental instability, or countless other improprieties properly characterized as "internal" under this Court's Rule 606(b) jurisprudence. For each of these examples, circumstances can be imagined in which a *voir dire* of the jury by the district court would not only be prudent but *indispensable* to meet due process requirements. The decision below, by examining the problem through the legally inapt framework of Rule 606(b), would foreclose that inquiry.

3. The accommodation of competing interests embedded in Rule 606(b) obliges jurors to report, and district courts to investigate, credible claims of misconduct *before* a verdict is returned. The district court plainly failed to discharge that duty here. After being advised by defense counsel of ongoing improprieties on *three* separate occasions, the district court determined, not that those reports were incredible or that they described acceptable conduct, but that investigation into them was *prohibited* by Rule 606(b). Because the allegations purportedly involved "internal" influences, the district court repeatedly stated that it lacked any legal authority to investigate. *See* App., *infra*, 53a ("[T]he only way you get that [hearing] is with illegal testimony under Rule 606(b)").[4] The court of appeals similarly began and ended its analysis with the proposition that the "discretion" that the district court enjoyed under the circumstances was "discretion *under Rule 606(b)*" (App., *infra*, 6a) (emphasis added), and on that basis accepted the

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[4] *See also* App., *infra*, 67a ("The only thing you can even take a statement on is whether there is an outside influence."); *Ibid.* ("The only thing that I can really consider under Rule 606(b) is an outside influence and . . . this doesn't involve outside influence.").

district court's decision not to investigate the allegations of misconduct.

Because the district court and court of appeals both analyzed the problem through the framework of Rule 606(b), each misperceived the proper scope of the district court's authority. That error requires reversal, because the district court and the court of appeals analyzed the scope of a trial court's discretion on the basis of an erroneous legal premise. *See, e.g.*, *Koon v. United States*, 518 U.S. 81, 100 (1996) (a court "by definition abuses its discretion when it makes an error of law"); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (same).[5] Thus, whatever "discretion" the district court had to address the allegations of misconduct was not exercised here, one way *or* the other, because the district committed legal error in believing that it had *no* discretion to investigate the reported misconduct in light of Rule 606(b). That conclusion—endorsed by the court of appeals—directly conflicts with the rule in other circuits. Because that issue is a recurring and important one that affects a district court's power to protect the integrity of the jury system, this Court should grant immediate review to resolve the circuit conflict.

II. The Federal Courts Of Appeals Are Divided Regarding The Permissibility Of The Supplemental Jury Charge In This Case.

The Eleventh Circuit's holding also exacerbates a division in the circuits regarding the propriety of modified *Allen* charges. Unlike the Eleventh Circuit, the vast majority of the courts of appeals have held that a supplemental charge to a

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[5] Because the district court did not conduct a hearing, neither petitioner, nor any reviewing court, can know whether "what actually transpired, or whether the incidents that may have occurred[,] were harmful or harmless." *Remmer v. United States*, 347 U.S. 227, 229 (1954). Review and reversal are warranted on that ground as well.

deadlocked jury ordinarily *must* contain either an admonition that jurors need not surrender their honestly-held convictions simply to secure a verdict or some equivalent cautionary language calculated to ensure that jurors who would vote for acquittal will not be coerced into voting to convict simply for the sake of returning a unanimous verdict. That division in the lower courts warrants immediate resolution by this Court.

1. It is well recognized that jury deliberations constitute a critical stage of a criminal trial and that "[a]ny criminal defendant . . . being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988). Indeed, this Court has emphasized that "the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration." *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (*per curiam*).

In *Allen v. United States*, 164 U.S. 492 (1896), this Court approved a jury instruction that directed jurors then holding dissenting views to reconsider their opinions in light of the views of the majority, and to decide the case unanimously if they could do so conscientiously. *Id.* at 498. Noting that the object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors, this Court endorsed that charge as embodying the common-sense proposition that a juror should approach deliberations with "deference" and "a distrust of his own judgment" if "he finds a large majority of the jury taking a different view of the case." *Id.* at 501-02.

In *Lowenfield v. Phelps*, 484 U.S. 231 (1988), this Court affirmed "the continuing validity of [the] observations in *Allen*." *Id.* at 237-38. *Lowenfield* involved a challenge to a supplemental jury charge that in combination with a jury poll was said to have coerced a death sentence. The supplemental charge at issue encouraged each juror to re-examine his opinions but admonished the jury not to "surrender your honest belief as to the weight and effect of [the] evidence solely because of the opinion of your fellow jurors or for the

mere purpose of returning a verdict." 484 U.S. at 235. The Court held that "the combination of the polling of the jury and the supplemental instruction was not 'coercive' in such a way as to deny . . . a constitutional right." *Id.* at 241. The Court also made clear, however, that "other combinations of supplemental charges and polling might . . . require a different conclusion." *Ibid.*

2. In the years since *Lowenfield* was decided, the courts of appeals have confronted a multitude of challenges to supplemental jury instructions raising claims of jury coercion. Those courts have repeatedly emphasized that a supplemental charge can place undue pressure on minority jurors to surrender their sincerely-held beliefs, and most have required that a supplemental charge to a deadlocked jury contain a cautionary instruction that will ensure that minority jurors will not abandon their sincerely-held, dissenting views solely for the sake of reaching a verdict.

The Second Circuit—in a decision that squarely conflicts with the Eleventh Circuit's decision in this case—has concluded that a cautionary admonition is a requirement of federal due process. *See Smalls v. Batista*, 191 F.3d 272 (2d Cir. 1999). In *Smalls*, the trial court instructed a jury that had reported itself deadlocked eleven to one to "continue to discuss the case" and to "continue a free discussion." 191 F.3d at 275. The Second Circuit held that the instruction offended due process principles because it did not contain cautionary language "admonish[ing] the jurors not to surrender their own conscientiously held beliefs." *Id.* at 279. Although the prosecutor contended that the charge at issue was not an "*Allen*" charge at all because the trial court "never urged the jury to reach a verdict, but rather ordered them only to continue to deliberate, argue and discuss," *ibid.*, the Second Circuit squarely rejected that contention, holding that the cautionary language requirement extended to "*any Allen*-type charge," which it defined as "a generic term used for a type of supplemental instruction that is given to a deadlocked jury." *Id.* at 275 n.1. "Regardless of the terminology used to

describe the charge that was given," the court of appeals explained, "the state's arguments fail to address, let alone overcome, the fatal flaw of the jury charge in this case: the lack of cautionary language which would discourage jurors from surrendering their own conscientiously held beliefs." *Id.* at 279.[6]

Other courts have reached a similar conclusion in the exercise of their supervisory powers. Four circuits—the First, Fourth, Sixth, and Ninth—have held that a supplemental charge will be deemed coercive in almost any case in which the trial court fails to emphasize, in some fashion, that jurors who favor acquittal should not vote to convict merely to reach a verdict. As then-Judge Kennedy wrote for the Ninth Circuit in *United States v. Mason*, 658 F.2d 1263 (9th Cir. 1981):

> [i]f the cases grappling with *Allen* have a common thread, it is this: the integrity of individual conscience in the jury deliberation process must not be compromised . . . . *It is essential in almost all cases to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party.*

Id. at 1268 (reversing convictions and ordering new trial) (emphasis added).

Similarly, in *United States v. Rogers*, 289 F.2d 433 (4th Cir. 1961), the Fourth Circuit reversed a conviction under the

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[6] The Second Circuit also noted that "[t]he necessity for such cautionary language is highlighted . . . because, as the trial judge was well aware, the jury was divided eleven to one when the supplemental instructions were given." 191 F.3d at 280. This Court has held that a supplemental charge is likely to have greater coercive power where the trial court is aware of how the jury is divided numerically at the time it gives the supplemental charge. *See, e.g., Brasfield v. United States*, 272 U.S. 448, 449 (1926); *Burton v. United States*, 196 U.S. 283, 307 (1905).

federal bank robbery statute, 18 U.S.C. § 2113(b), where the district court, upon learning that the jury was deadlocked, "instructed the jury regarding its duty to agree, but without the ameliorating admonition that no juror should yield his conscientious conviction." 289 F.2d 434. The Fourth Circuit explained that while "[i]t is proper for the judge to admonish jurors who are in disagreement to re-examine their opinions," it must be made "equally clear that the jury's verdict must represent the final judgment of each juror, and not merely his acquiescence in a majority view of which he remains conscientiously unconvinced." *Id.* at 436-37 (quotation and citation omitted). "When the moderating condition which makes [the supplemental charge] permissible . . . is omitted," the Fourth Circuit concluded, "then the direction becomes so likely to be coercive, that a verdict rendered promptly thereafter should not be allowed to stand." *Ibid.*; *see also United States v. Nwaneri*, 74 F.3d 1234, 1996 WL 15468 at * 4 (4th Cir. 1996) (unpublished opinion) (relying on *Rogers* to reverse conviction on ground that supplemental *Allen* charge failed "to advise the jurors not to surrender their honest convictions"); *United States v. Mitchell*, 720 F.2d 370, 371 (4th Cir. 1983) (reversing conviction and citing *Rogers* for proposition that the charge in *Allen* "approached the ultimate permissible limits . . . to which the court should go in suggesting to jurors the desirability of agreement").

The Sixth Circuit reached a similar conclusion in *United States v. Scott*, 547 F.2d 334 (6th Cir. 1977), where the court reversed a conviction under 18 U.S.C. § 871 because the trial court gave a supplemental charge to a deadlocked jury that failed to caution that no juror "should surrender an honest conviction about the case simply because other jurors disagreed." *Id.* at 337. The Sixth Circuit observed that "[a]ny variation upon the precise language approved in *Allen* imperils the validity of the trial" and emphasized that "[t]he reminder that no juror should merely acquiesce in the majority opinion is therefore one of the most important parts of the *Allen* charge." *Ibid.*; *see also United States v.*

Hernandez-Albino, 177 F.3d 33, 38 (1st Cir. 1999) (noting that "[a]ny supplemental instruction in response to a jury's deadlock can have a significant coercive effect," and holding that every anti-deadlock charge must "acknowledge that the jury has the right not to agree").[7]

3. In contrast to the approach taken by these courts, the Fifth and Seventh Circuits, like the Eleventh Circuit in this case, have accepted the contention that a supplemental jury charge to "continue to deliberate" is unproblematic either as a matter of constitutional due process or supervisory power. Those courts have reasoned that such charges are not "traditional *Allen* charge[s]" because they are "content neutral and carr[y] no plausible potential for coercing the jury." *United States v. D'Antonio*, 801 F.2d 979, 983-84 (7th Cir. 1986); *see also United States v. Warren*, 594 F.2d 1046, 1049-50 (5th Cir. 1979); *United States v. Kramer*, 955 F.2d 479, 489 (7th Cir. 1992); *United States v. Thibodeaux*, 758 F.2d 199, 203 (7th Cir. 1985).

Those decisions cannot be reconciled with this Court's cases. Each of the instructions upheld by this Court in jury coercion cases has contained cautionary language. *See Allen*, 164 U.S. at 501; *Lowenfield*, 484 U.S. at 235 (noting that charge instructed jury to "consult with one another . . . [and] discuss the evidence . . . if you can do so without violence to

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[7] Two other circuits—the Third and District of Columbia—eschew the traditional *Allen* charge altogether in favor of a more neutral version recommended by the American Bar Association. *See United States v. Fioravanti*, 412 F.2d 407, 419-20 (3d Cir. 1969); *United States v. Thomas*, 449 F.2d 1177, 1187 (D.C. Cir. 1971) (*en banc*). The charge adopted by those circuits is tailored to emphasize that jurors need not relinquish their honestly-held convictions simply for the sake of reaching a verdict. A supplemental "anti-deadlock" charge that lacks the requisite cautionary language is often held to be reversible error in those courts. *See, e.g., United States v. Strothers*, 77 F.3d 1389, 1390 (D.C. Cir. 1996); *Government of the Virgin Islands v. Hernandez*, 476 F.2d 791, 794 (3d Cir. 1973).

[your] individual judgment"); *Hyde v. United States*, 225 U.S. 347, 383 (1912) (affirming supplemental charge because trial court "took care to say to the jury that the law would not recognize a coerced verdict, and that . . . if they could not conscientiously and freely agree upon a verdict they would be discharged") (internal quotations omitted). That fact is not a mere coincidence. It is precisely when an impasse is reached that jurors most need to be told that they need not relinquish their sincerely-held views simply to secure a verdict. *See Burton v. United States*, 196 U.S. 283, 307 (1905) ("Balanced as the case [is] in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it [is a situation] where the most extreme care and caution [are] necessary in order that the legal rights of the defendant should be preserved.").

Indeed, absent some strong cautionary language, a supplemental instruction to continue deliberations carries the same coercive effect as the instruction "[y]ou've got to reach a decision in this case," which this Court held to be coercive in *Jenkins*. *See* 380 U.S. at 346. As this Court repeatedly has recognized, "jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985); *see also Richardson v. Marsh*, 481 U.S. 200, 206 (1987). A court that instructs a deadlocked jury to "continue to deliberate" merely leaves implicit what the instruction in *Jenkins* made explicit, namely, that deadlock is inappropriate or unacceptable, and that a verdict *must* be returned. *See also United States v. Gypsum*, 438 U.S. 422, 462 (1978) (trial court's suggestion to foreman that it was desirable that the jury return a verdict justified reversal "*solely* o[n] the *risk* that the foreman believed the court was insisting on a dispositive verdict") (emphasis added). To an attentive jury, however, the message is conveyed just the same. Thus, the Eleventh Circuit was clearly wrong to conclude that the supplemental

instruction was not a coercive "*Allen*" charge simply because "[n]othing in this brief instruction suggested that a particular outcome was either desired or required." App., *infra*, 9a. No jury could fail to appreciate that there was no point to the trial court's instruction other than to eliminate the deadlock and produce a verdict.

4. The Eleventh Circuit's decision thus contributes to an intractable circuit split regarding the propriety of the supplemental jury charge at issue in this case. Because that supplemental charge was indisputably an "*Allen*-type charge," *Smalls*, 191 F.3d at 279-80—*i.e.*, it was directed to a deadlocked jury for the purpose of encouraging it to reach a verdict—it is plain that it would be deemed a due process violation in the Second Circuit and, at a minimum, a violation of proper federal criminal procedure in several courts of appeals.[8] Only review by this Court can decisively resolve this disagreement on a question of federal criminal procedure that affects a vast number of criminal trials.

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[8] The need for review is heightened, rather than diminished, by the fact that several courts of appeals have addressed the supplemental jury charge at issue here under the rubric of supervisory authority rather than explicitly under the Constitution. As this Court has recognized repeatedly, the exercise of appellate supervisory authority cannot conflict with constitutional commands, *see Thomas v. Arn*, 474 U.S. 140, 148 (1985), and, in any event, even in the absence of constitutional imperatives "supervisory" rules must "represent reasoned exercises of the courts' authority." *Ortega-Rodriguez v. United States*, 507 U.S. 234, 244 (1993). Because it would be intolerable for courts of appeals to invoke "supervisory" authority to devise widely divergent trial systems in different regions of the country, this Court has frequently reviewed the propriety of supervisory rules established by the courts of appeals. *See Ortega-Rodriguez*, 507 U.S. at 244; *Thomas*, 474 U.S. at 148; *United States v. Hasting*, 461 U.S. 499, 506-07 (1983); *United States v. Payner*, 447 U.S. 727, 735 (1980).

III. The Decision Below Departs From The Established Tradition That A "Counterfeit" Must Be Similar To A Genuine Original And Interferes With Congress's Enforcement Scheme

Although the Eleventh Circuit admitted that "virtually every court of appeals" construes criminal counterfeiting statutes to require a finding of "similitude" (App., *infra*, 10a (collecting authorities)), the court departed from that uniform course of lower court decisions on the sole ground that the language of 18 U.S.C. § 513 establishes that Congress intended in this statute to depart from that body of authority. Because the Eleventh Circuit's conclusion is belied rather than supported by the text of Section 513 and by applicable canons of construction and the legislative history, that court had no sound or even permissible reason to depart from the established and uniform construction of the federal counterfeiting statutes that concededly is followed by other circuits. Review is needed to restore coherence and uniformity to the approach to counterfeiting offenses that prevailed in the lower courts until the decision below.

1. The plain language of Section 513(c)(1) demonstrates Congress's affirmative intent to incorporate a "similitude" requirement. The statute defines the term "counterfeited" to mean "a document that *purports to be genuine* but is not, because it has been falsely made or manufactured in its entirety." 18 U.S.C. § 513(c)(1) (emphasis added). The phrase "purports to be genuine" necessarily implies a comparison between the alleged forgery and the genuine article. Similarly, the definitional requirement that a counterfeit "is not" genuine necessarily presupposes the existence of a genuine article that the purported counterfeit has attempted, unsuccessfully, to emulate. In its relevant part, therefore, the statute echoes centuries-old definitions of

"counterfeit," which also draw explicit comparisons between a "counterfeit" and the "genuine" original that it imitates.[9]

2. That reading of Section 513 is also compelled by well-established canons of statutory construction. Where, as here, "a common-law principle is well established . . . , the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Federal Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (quotation and citation omitted). Here, far from making "evident" any intent to depart from the common law requirement of similitude, the language of Section 513 affirmatively suggests that Congress intended to *embrace* that requirement.

Indeed, even if the text of Section 513 did not affirmatively invite the comparison that was required at common law, Congress's use of the traditional terminology of counterfeiting offenses—"counterfeit" and "genuine"—would be sufficient by itself to incorporate that requirement into Section 513. This Court has long recognized that "when Congress uses language with a settled meaning at common law, Congress 'presumably knows and adopts the cluster of ideas that were attached to each borrowed word.'" *Beck v. Prupis*, 120 S. Ct. 1608, 1614 (2000) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)). In such cases, this Court has explained, the "'absence of contrary direction may

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[9] *See* 3 *Oxford English Dictionary* 1027 (2d ed. 1989) ("to make (anything) in fraudulent imitation of something else; to make or devise (something spurious) and pass it off as genuine"; quoting examples of this usage dating back to the fourteenth century); 1 John Bouvier, *A Law Dictionary* 246 (1839) ("To make something false in the semblance of that which is true"); *see also Black's Law Dictionary* 349 (6th ed. 1990) (defining "counterfeit" as "to copy or imitate, without authority or right, and with a view to deceive or defraud, by passing the copy or thing forged for that which is original or genuine"); *Black's Law Dictionary* 315 (5th ed. 1979) (same).

be taken as satisfaction with widely accepted definitions, not as a departure from them.'" *Ibid.* That interpretive principle is dispositive here.

The legislative history confirms that Congress intended to incorporate a similitude requirement in Section 513. The Senate Report that accompanied the legislation expressly states that the statutory definition of "counterfeited" was intended to "*carry forward* the general view that, in order for an article to be counterfeit, it need only bear such likeness or resemblance to the genuine article as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be upright and honest." S. REP. NO. 97-307, at 775-76 (1981). This makes the Eleventh Circuit's reading of Section 513 all the more remarkable and impermissible, since it demonstrates that the court of appeals openly flouted Congress's purpose in the service of a blinkered conception of the words' plain meaning. As this Court recently observed, courts have an "obligation to . . . give effect to congressional purpose so long as the congressional language does not itself bar that result." *Johnson v. United States*, 120 S. Ct. 1795, 1805 n.10 (2000).

3. The Eleventh Circuit's decision also interferes with Congress's carefully-crafted enforcement scheme. In fact, the decision effectively nullifies the operative effect of 18 U.S.C. § 514, a provision of the United States Code that immediately follows the statute at issue in this case. Section 514, which is entitled "Fictitious obligations," criminalizes the making, passing, or uttering of

> any false or *fictitious instrument*, document, or other item appearing, representing, *purporting*, or contriving through scheme or artifice, *to be an actual security* or other financial instrument issued under the authority of the United States, a foreign government, a State or other political subdivision of the United States, or an organization.

Id. § 514(a) (emphases added). Of course, this is what Prosperi is alleged to have done: to have created a wholly fictitious instrument that purported to be an actual security, even though no such security existed. App., *infra*, 14a-15a. Notably, unlike Section 513, Section 514 contains no references to "counterfeit[ing]" or to "genuine" originals.[10]

The intended relationship between Sections 513 and 514 is made plain by the legislative history of Section 514. In 1995, Senator D'Amato introduced a bill containing language identical to what later became Section 514. *See* Financial Instruments Anti-Fraud Act of 1995, S. 1009, 104th Cong. § 3. He explained that his bill proposed a new crime that would "close[] a loophole in Federal counterfeiting law." 141 CONG. REC. S9534 (daily ed. June 30, 1995). The loophole that Senator D'Amato described was the failure of any of the counterfeiting provisions in title 18 to apply when "fictitious instruments are not counterfeits of any *existing negotiable instrument*." *Id.* at S9533 (emphasis added).[11]

[10] Section 514 explicitly incorporates several of Section 513's definitions, *id.* § 514(b), thus demonstrating that those two sections should be construed *in pari materia*.

[11] The Eleventh Circuit feared that accepting Prosperi's argument would "license counterfeiters to create fictitious documents with impunity." App., *infra*, 17a. In fact, as Senator D'Amato's statement demonstrates, that is what Congress had inadvertently allowed to happen before it enacted Section 514. Of course, even before that loophole in the federal counterfeiting statutes was closed, the creation of fictitious documents could be punished as securities fraud, or wire or mail fraud. *See, e.g., SEC v. Lauer*, 52 F.3d 667, 669 (7th Cir. 1995) (purported investment in "'Prime Bank Instruments,' a non-existent high-yield security" subject to securities fraud provisions); *First Nat'l Bank v. Russell*, 657 F.2d 668, 673 n.16 (5th Cir. 1981) (SEC has jurisdiction even if "security purportedly traded is nonexistent or fictitious"). Here, the Government's attempt to charge Prosperi with mail fraud fell quite short of producing legally sufficient evidence, justifying the trial court's decision to enter a judgment of acquittal on those counts.

When Congress later enacted Section 514—on September 30, 1996, well *after* Prosperi allegedly committed the "counterfeiting" offenses for which he was convicted, *see* Pub. L. No. 104-208, 110 Stat. 3009-367, -470 (1996)—it clearly intended to fill that gap.

Yet in holding that Section 513 creates a novel form of "counterfeiting" that applies even where there is no genuine original to be copied, the Eleventh Circuit effectively determined that the statutory gap Congress understood itself to be filling with Section 514 did not exist. Because in so ruling the Eleventh Circuit also concededly departed from the uniform construction given to federal counterfeiting statutes by the lower federal courts (App., *infra*, 11a), the Eleventh Circuit's decision warrants this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

Arnold Paul PROSPERI, Defendant-Appellant.

United States of America, Plaintiff-Appellant,

v.

Arnold Paul Prosperi, Defendant-Appellee.

Nos. 98-4605, 98-4692.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

January 28, 2000, Decided

January 28, 2000, Filed

JUDGES: Before COX, Circuit Judge, KRAVITCH, Senior Circuit Judge, and PROPST*, Senior District Judge. *Honorable Robert B. Propst, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

OPINION: KRAVITCH, Senior Circuit Judge:

This appeal involves a statutory interpretation question of first impression: whether the definition of "counterfeited" provided in 18 U.S.C. § 513(a) incorporates or replaces the preexisting common law definition which requires a showing of similitude between the counterfeit and genuine obligations. Also presented is the extent to which evidence, admitted for charges that were later dismissed, may "spill over" and prejudice the jury's consideration of the remaining counts. Finally, this appeal considers allegations of juror misconduct, a disputed *Allen* charge, and challenges to the admission of evidence of extrinsic offenses.

I. BACKGROUND AND PROCEDURAL HISTORY

Arnold Paul Prosperi practiced real estate law in Palm Beach, Florida. As an attorney, Prosperi represented Patrick Donovan, an Irish citizen, and managed various financial matters for him. From approximately 1979 until 1995, Prosperi handled all of Donovan's investments in the United States, both in real estate and securities, acting as attorney and trustee. During his winter visits to Florida, Donovan met with Prosperi and reviewed the status of his investments at these meetings. Prosperi conducted much of Donovan's business through the Amaretto Corporation ("Amaretto"), a company incorporated in the Netherlands Antilles. Amaretto was beneficially owned by Donovan and his family, but Prosperi was granted power of attorney with authority to conduct all the corporation's affairs on Donovan's behalf.

During this period, Prosperi orchestrated three major real estate transactions and one mortgage refinancing for Donovan. First, Prosperi arranged the purchase and subsequent sale of a golf course from Amaretto to the United States Department of Veterans Affairs for $3,050,000 ("the Holigolf transaction"). Second, Prosperi arranged the purchase, renovation, and sale of a residential property at 143 East Inlet Drive in Palm Beach, Florida ("the Inlet Drive transaction"). For this transaction only, Amaretto purchased 50% of the property and initially loaned Prosperi money to acquire the other 50%. Third, Prosperi bought property at 109 Royal Palm Way and constructed a commercial bank building using another company beneficially owned by Donovan, Perth Holdings, Ltd. ("the Royal Palm transaction"). Prosperi also managed the building on Donovan's behalf. Finally, Prosperi arranged the mortgage refinancing on the Royal Palm property for an amount $1.6 million in excess of the remaining principal ("the Refinancing transaction").

According to the Government, Prosperi began to misappropriate funds from Donovan's proceeds in 1987 for

his personal use, creating false account statements and other documents to hide his subterfuge. Prosperi allegedly diverted the entire $3 million proceeds of the Holigolf transaction for his personal use[1] while advising Donovan that these funds were invested in certificates of deposit ("CDs"). To bolster the deception, Prosperi created documents purporting to be CDs issued by J.P. Morgan bank and Morgan Guaranty Trust together with supporting paperwork. Prosperi presented these documents to Donovan during their annual meetings and represented them as genuine investments. Prosperi then failed to report the misdirected funds on his federal income tax returns, omitting $905,616 from his 1989 return and $532,000 from his 1990 return. The Government also claims that Prosperi diverted rent revenue from the properties on Inlet Drive and Royal Palm Way, as well as proceeds from the Refinancing transaction, and created false account statements to shield these activities from Donovan.

Donovan did not suspect the embezzlement until he was contacted by a representative of the United States Internal Revenue Service investigating Amaretto's tax liability arising from the Holigolf transaction. Although Donovan initially denied any connection to the company,[2] he later acknowledged his interest and cooperated with the agent. During that time, Donovan provided the Government with

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[1] The total proceeds of the sale were $3,050,000. Both parties agree that Prosperi retained $50,000 of that amount as remuneration for arranging the transaction.

[2] According to Prosperi, Donovan used Amaretto and Prosperi as part of a larger scheme to conceal his wealth from the Irish Government. Donovan later settled his tax liability with the Irish Government for $4 million but denied that Prosperi's actions on his behalf had any illicit purpose.

the financial documents he received from Prosperi and taped most of his phone conversations with Prosperi in which Prosperi apologized for taking money from Donovan and promised to return the money with interest, as soon as he was able.

In September 1996, a grand jury in Florida returned an indictment against Prosperi charging him with two counts of mail fraud under 18 U.S.C. § 1341 (Counts I and II), three counts of possessing a counterfeited security under 18 U.S.C. § 513(a) (Counts III-V), eight counts of money laundering under 18 U.S.C. §§ 1956 and 1957 (Counts VI-XIII), and two counts of filing a false tax return under 26 U.S.C. § 7206(1) (Counts XIV and XV). The circumstances surrounding the Holigolf transaction proceeds comprised the basis of both the counterfeiting and tax counts. The mail fraud and money laundering counts were based primarily on Prosperi's alleged misappropriation of funds from the Inlet Drive transaction, the Royal Palm transaction, and the Refinancing transaction. In June, 1997, the indictment was superseded to revise the money laundering counts and to add a forfeiture count under 18 U.S.C. § 982 (Count XVI).

Prosperi filed four separate motions to dismiss Counts I and II, III-V, VI-IX, and X-XIII, respectively. The district court adopted the Report and Recommendation of the magistrate judge and denied all the motions to dismiss. The case then proceeded to a two-month long trial. At the close of the Government's evidence, Prosperi moved for a judgment of acquittal on the mail fraud and money laundering counts on the ground that the Government had failed to prove that the mailings charged in the indictment furthered the scheme to defraud. The district court granted the motion and acquitted Prosperi on counts I, II, and VI-XIII. The court then sent the remaining tax and counterfeiting counts (Counts III-V and XIV-XV, respectively) to the jury.

The jury returned a guilty verdict on all counts. Prosperi sought a judgment of acquittal on the counterfeiting counts

on the ground that the Government did not prove the J.P. Morgan CDs bore a sufficient resemblance to genuine CDs in order to qualify as "counterfeited" within the meaning of 18 U.S.C. § 513. The district court initially denied the motion, but on reconsideration and after oral argument, granted the motion and entered an order granting acquittal as to Counts III, IV, and V.[3] Prosperi appeals his remaining convictions on the two tax counts, arguing that he was prejudiced by spillover evidence introduced for the other counts, irregularities in the jury deliberations, and by the cumulative effect of prejudicial errors during the trial. The Government, on cross-appeal, challenges the district court's grant of acquittal on the counterfeiting counts. For the reasons that follow, we affirm Prosperi's convictions on the tax counts, reverse the district court's grant of acquittal on the counterfeiting counts, and remand for resentencing.

II. ANALYSIS

A. Alleged Juror Misconduct

On the second full day of deliberation, a dismissed alternate juror notified Prosperi's counsel that one of the sitting jurors, Marilyn Budd, had called her in tears because she was being pressured by other jurors to convict Prosperi. The alternate also related that another sitting juror, Morris Levy, had decided to convict on the first day of testimony and had arranged the election of a like-minded juror as foreperson. Counsel reported this to the court and requested a mistrial or an inquiry. The district judge denied the request but sent the jury a note reminding them not to discuss the case unless all twelve jurors were present. Later, defense counsel requested either a mistrial or full investigation after

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[3] Prosperi also moved for a new trial on all counts; the district court denied this motion initially and again after granting Prosperi's motion for acquittal.

observing juror Levy in a heated discussion with juror Budd away from the other jurors. The district court ruled that Federal Rule of Evidence 606(b)[4] precluded him from inquiring into the jury deliberations. The next morning, the district court conducted a limited inquiry, at the request of the Government, to determine if the dismissed alternate had exerted an improper outside influence on Budd. The alternate juror reported that she had advised Budd to resist pressure to change her vote. The district court did not permit defense counsel to make additional inquiry of the alternate, again citing Rule 606(b).

Investigation of alleged juror misconduct is committed to the discretion of the district court and is reviewed only for an abuse of that discretion. *See United States v. Harris*, 908 F.2d 728, 733 (11th Cir. 1990). Prosperi argues that the district court misapprehended the scope of its discretion under Rule 606(b) in refusing to conduct an investigation, and that this was a *per se* abuse of discretion. We repeatedly have recognized the breadth of the district court's discretion under Rule 606(b), and a "failure to hold a hearing constitutes an abuse of discretion only when there is evidence

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[4] Federal Rule of Evidence 606(b) provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

that the jury was subjected to influence by outside sources." *United States v. Watchmaker*, 761 F.2d 1459, 1465 (11th Cir. 1985). In this case, the district court investigated the possibility of external influence by the excused alternate, but declined to investigate allegations of internal influence occurring during deliberations. Not only was this decision within its discretion, but a contrary decision may have invited reversible error. *See United States v. Norton*, 867 F.2d 1354, 1366 (11th Cir. 1989) (finding no abuse of discretion in district court's declination to question juror regarding alleged duress during deliberations because the "alleged harassment or intimidation of one juror by another would not be competent evidence to impeach the guilty verdict"). Even if the district court underestimated the scope of its discretion under Rule 606(b), the court's ultimate decision not to investigate allegations of misconduct that were entirely endemic to the deliberations was not an abuse of its discretion.

B. The Contested *Allen* Charge

During its deliberations, the jury sent the judge a note "indicating a verdict on 3, 4 and 5 [the counterfeiting counts]" but that "they are hung up on 14 and 15 [the tax counts] and ... there is no change in the near future."[5] Over defense counsel's objection, the district judge declined to give a full *Allen* charge and instead instructed the jury to "please continue to deliberate on counts 14 and 15."[6] Prosperi argues this instruction constituted an abbreviated *Allen* charge that coerced the jury's ensuing guilty verdict on all counts. Prosperi relies exclusively on *United States v. Bass*, 490 F.2d 846, 854-55 (5th Cir. 1974), *overruled on other grounds by United States v. Lyons*, 731 F.2d 243, 246

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5 R34 at 4814-15.

6 *Id.* at 4815.

(5th Cir. 1984), in which our predecessor court reversed a conviction coerced by an improper *Allen* charge.[7] This reliance is misplaced. In *Bass* the jury asked whether it would be acceptable to return a verdict of guilt on some counts and hang as to others, to which the district court responded with an instruction to continue to deliberate on those counts for which the jury were "not yet in unanimous agreement." 490 F.2d at 854. The *Bass* court found that, because this instruction bore all the coercive aspects of a typical *Allen* charge but none of its curative features, it may have caused the jury to believe that only guilty verdicts were acceptable. *See id.*

An *Allen* charge in the absence of a prior poll of the jury will warrant reversal only when "inherently coercive." *United States v. Trujillo*, 146 F.3d 838, 846 (11th Cir. 1998). The instruction given here, however, can not be properly considered an *Allen* charge. The judge's simple request that the jury continue deliberating, especially when unaware of the composition of the jury's nascent verdict, was routine and neutral. Nothing in the brief instruction suggested that a particular outcome was either desired or required and it was not "inherently coercive." *See Watchmaker*, 761 F.2d at 1465 (finding judge's entreaty to "go back in there and work with those other eleven people and try to render a verdict" was not coercive); *see also Norton*, 867 F.2d at 1366 (finding instruction encouraging continued deliberation did not "approximate an *Allen* charge or in any other way urge a verdict").[8]

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[7] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[8] Prosperi also suggests that, in light of the irregularities in the jury proceedings, the subsequent charge would appear to the jury as an exhortation to convict. However, the "irregularities" cited by

[Footnote continued on next page]

C. The Counterfeiting Statute

The jury found Prosperi guilty of three counts of making, uttering, or possessing a counterfeited security with the intent to deceive another person, in violation of 18 U.S.C. § 513(a).[9] The statute defines the term "counterfeited" as "a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety." 18 U.S.C. § 513(c)(1). After the verdict was returned, Prosperi moved for acquittal on the counterfeiting counts because the Government had failed to establish the requisite similarity between the J.P. Morgan CDs and genuine CDs. The court initially denied the motion but, on reconsideration, granted the acquittal. On appeal, the Government argues the district court erred in interpreting § 513(a) to require a finding of similitude in contravention of the statute's plain definition of the term "counterfeited." We find the Government's argument persuasive.

A district court's interpretation of a statute is a question of law reviewed *de novo*. *See Rodriguez v. Lamer*, 60 F.3d 745, 747 (11th Cir. 1995). Interpretation of this particular aspect of the counterfeiting statute is a question of first

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[Footnote continued from previous page]
Prosperi, and discussed in the previous section, are not as irregular as he submits. Any suggestion that the jury was made more vulnerable to coercion thereby is speculation unsupported by the record.

[9] 18 U.S.C. § 513(a) provides:

Whoever makes, utters or possesses a counterfeited security of a State or a political subdivision thereof or of an organization, or whoever makes, utters or possesses a forged security of a State or political subdivision thereof or of an organization, with intent to deceive another person, organization, or government shall be fined under this title or imprisoned for not more than ten years, or both.

impression,[10] but recourse to older counterfeiting statutes is instructive. Traditional counterfeiting statutes left their key term undefined. In determining whether a fraudulent $100 bill was counterfeited within the meaning of 18 U.S.C. § 264, the Court of Appeals for the Third Circuit applied the following test:

> [W]hether the fraudulent obligation bears such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest.

United States v. Lustig, 159 F.2d 798, 802 (3d Cir. 1947), *rev'd on other grounds*, 338 U.S. 74, 69 S. Ct. 1372, 93 L. Ed. 1819 (1949). This has become known as the similitude requirement and was adopted by virtually every court of appeals including this one. *See United States v. Wethington*, 141 F.3d 284, 287 (6th Cir. 1998); *United States v. Parr*, 716 F.2d 796, 807 (11th Cir. 1983); *United States v. Parnell*, 581

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[10] Two courts have briefly addressed the meaning of "counterfeited" in § 513 in different contexts. In *United States v. Pullman*, 187 F.3d 816, 822 (8th Cir. 1999), *cert. denied*, __U.S.__, 120 S. Ct. 802, 145 L. Ed. 2d 676 (2000), the Eighth Circuit observed, without discussion, that § 513 provided its own definition of "counterfeited." The question before the *Pullman* court, however, was whether § 513 applied to documents "made from scratch," thus its brief discussion of the statute does not illuminate the discussion here. In *United States v. Davis*, 888 F.2d 283, 285 (3d Cir. 1989), the Third Circuit concluded, without discussion, that because "washed" automobile certificates satisfied the "falsely made" requirement of 18 U.S.C. § 2314, they were also counterfeit within § 513's definition as "falsely made or manufactured in its entirety." *See also United States v. Blakey*, 960 F.2d 996, 999-1000 (11th Cir. 1992) (citing § 513's definition of "counterfeited").

F.2d 1374, 1381 (10th Cir. 1978); *United States v. Anderson*, 532 F.2d 1218, 1224 (9th Cir. 1976); *United States v. Chodor*, 479 F.2d 661, 664 (1st Cir. 1973); *United States v. Smith*, 318 F.2d 94, 95 (4th Cir. 1963). The counterfeiting statutes, 18 U.S.C. §§ 472, 473, and 474, were then held to require a finding of similitude, with the understanding that the common law definition would apply. *See Wethington*, 141 F.3d at 287 (§ 472); *Chodor*, 479 F.2d at 664 (§§ 472, 473, and 474); *Smith*, 318 F.2d at 95 (§ 472).

With the passage of § 513, Congress broke from the tradition established in §§ 472, 473, and 474 by incorporating its own definition of the term "counterfeited": "a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety." 18 U.S.C. § 513(c)(1). In spite of this language, the district court accepted Prosperi's argument that § 513, like its counterfeiting predecessors, contained an implicit similitude requirement. Finding the government had not met its burden to prove similitude between the J.P. Morgan CDs and genuine CDs, the court granted Prosperi's motion for acquittal on the three counterfeiting counts. On appeal, the Government argues the district court misinterpreted the statute.[11]

In the case of currency or other generally recognizable documents, a similitude requirement developed both as a definition, allowing for juries to determine whether a counterfeit document copied its genuine analogue, and as evidence of the defendant's intent to defraud. *See United*

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[11] Both the Government and Prosperi argue the other waived their respective similitude arguments by not raising them at trial, but the Government timely appealed the district court's grant of acquittal on Prosperi's counterfeiting counts. Review of this decision turns on the proper interpretation of 18 U.S.C. § 513, a question we review *de novo*.

States v. Hall, 801 F.2d 356, 358-59 (8th Cir. 1986). In cases involving less recognizable documents, however, the Government argues that greater protection for the unsuspecting individual is warranted.

Review of a statute begins with its language. *See Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S. Ct. 2297, 2301, 85 L. Ed. 2d 692 (1985). If the meaning of the statutory language is plain, reference to legislative history is not necessary. *See United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 240-41, 109 S. Ct. 1026, 1030, 103 L. Ed. 2d 290 (1989). By its plain language, § 513 defines the term "counterfeited" without reference to similitude. Legislative usurpation of existing common law definitions should not be presumed lightly. *See Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S. Ct. 1011, 1014, 96 L. Ed. 1294 (1952). But when Congress speaks clearly on an issue, and when the language chosen comports with the statutory purpose, the legislative definition supplants the preexisting common law definition. *See id.; United States v. Texas*, 507 U.S. 529, 533, 113 S. Ct. 1631, 1634, 123 L. Ed. 2d 245 (1993).

In determining that a finding of similitude was required for Prosperi's conviction, the district court relied on one statement from the legislative history of § 513 stating that the statute's definition of counterfeited "carries forward the general view that, in order for an article to be counterfeit, it need only bear such likeness or resemblance to the genuine article as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be upright and honest." Senate Report of the Committee on the Judiciary, Criminal Code Reform Act of 1981, No. 97-307, 97th Cong. § 1741 at 775-76. In light of the unambiguous language in the statute, reference to the legislative history was not necessary.

An interpretation of § 513 that does not incorporate a similitude requirement also is supported by the statute's stated purpose. The Government notes that § 513 was

enacted to address the increasing production of counterfeited documents that are not as generally recognizable as currency, such as CDs. *See* S. Rep. No. 225, 98th Cong., 1st Sess. at 371, *reprinted in* 1984 U.S.S.C.A.N. 3182, 3512 ("Present Federal law is inadequate to combat widespread fraud schemes involving the use of counterfeit State and corporate securities."). With that goal in mind, Congress needed a broader definition of "counterfeited." If the average consumer does not know what a genuine CD looks like, she would not be protected fully by a statute criminalizing only those counterfeits that resemble genuine CDs.[12]

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[12] In addition to arguing that § 513 does not require a finding of similitude, the Government rummages about the case law for decisions in which courts have not required similitude in other counterfeiting cases. The Government cites *Hall*, 801 F.2d at 358, for the proposition that similitude is only required in possession cases. In *Hall*, the Eighth Circuit held a finding of similitude was not required for a conviction of passing an altered obligation in violation of 18 U.S.C. § 472. *See id.* at 360. The court reasoned that the similitude requirement originated primarily as a definition of "counterfeited" and secondarily as evidence of intent to defraud, an element of all counterfeiting laws but especially significant in cases of possession only. *See id.* at 358-59. Because an intent to defraud could be inferred from the defendant's attempt to pass an altered $10 bill and because the currency involved was altered rather than counterfeited, the *Hall* court found a similitude requirement unnecessary for either of its two purposes. *Id.* at 360. The *Hall* decision does not inform the question before this court.

As another alternative, the Government cites *United States v. Turner*, 586 F.2d 395 (5th Cir. 1978), to argue the similitude requirement was satisfied here. In *Turner*, our predecessor court held that crude, one-sided, monochromatic photocopies of dollar bills were counterfeit within the meaning of 18 U.S.C. § 474 even though they bore scant resemblance to genuine currency. *See id.* at 397-98. The court reasoned that the successful use of the phony bills to obtain change from machines "demonstrated their dangerousness." *Id.* at

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Although § 513's definition of "counterfeited" is unique among counterfeiting statutes, § 2B5.1 of the United States Sentencing Guidelines defines "counterfeited" in precisely the same terms, *see* U.S. Sentencing Guidelines Manual § 2B5.1 applic. n.3 (1998), and courts interpreting the "purports to be genuine" language in § 2B5.1 have not required a finding of similitude. *See United States v. Webster*, 108 F.3d 1156, 1157 (9th Cir. 1997) (Section 2B5.1 does "not require counterfeit bills to be of 'passable' quality. They must 'purport' to be genuine but need not be mistakable as such."); *see also United States v. Lamere*, 980 F.2d 506, 513 (8th Cir. 1992) (U.S.S.G. § 2B5.1 does not "require that the counterfeit bill or bills in question be of passable quality").

Prosperi suggests that because J.P. Morgan does not issue CDs, the phony J.P. Morgan CDs could not purport to be genuine. Accepting this argument would license counterfeiters to create fictitious documents with impunity. *Cf. United States v. Schlei*, 122 F.3d 944, 972-73 (11th Cir. 1997) (holding that counterfeit, forged, and nonexistent securities were included within the definition of "security" for purposes of securities fraud charge because to hold otherwise would only encourage fraud), *cert. denied*, 523 U.S. 1077, 118 S. Ct. 1523, 140 L. Ed. 2d 674 (1998). Prosperi also argues that, without hearing evidence on the characteristics of a genuine CD, the jury would have been unable to determine whether the CDs "purported to be genuine." Prosperi notes the false J.P. Morgan CDs here

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398. The court's decision, however, turned on the fact that "the language of section 474 covering obligations 'made or executed, in whole or *in part*, after the similitude' of genuine obligations is amply broad to include the photocopies in this case." *Id.* (quoting 18 U.S.C. § 474) (emphasis added). Because we do not interpret § 513 to require a finding of similitude, these arguments do not affect our decision in any event.

were very crude and lacked many crucial features of genuine CDs, most significantly a drawer's signature. However, similarity to genuine CDs, to the extent that could have been elucidated given their inherent variety, is only one factor to consider in determining whether a security "purports to be genuine."

Using the evidence presented in this case as an example, the jury could have found the fraudulent CDs "purported to be genuine" because they were accompanied by supporting documentation, were represented as such by an attorney and trustee, and were, in fact, accepted as genuine by the intended victim. Thus, although similitude to a genuine analogue may help establish that a bogus security "purports to be genuine," a particular showing of such is not necessary to sustain a conviction under § 513. In any event, the Government did elicit testimony from Sharon Adams, a manager for a subsidiary of J.P. Morgan, that the counterfeited J.P. Morgan and Morgan GuarantyTrust Company CDs exhibited many official-looking features, such as the Morgan name, an account number, opening and maturity dates, initial principal amount, stated interest rate, and a warning of the penalty for early withdrawal of the deposited funds.[13] The jury could have found these features were included in the counterfeited CDs to increase the likelihood they would be accepted as genuine, and that is the standard required by § 513. The district court erred in interpreting 18 U.S.C. § 513 to require a similitude requirement.[14] The court's order of acquittal will be reversed and Prosperi's convictions for making, uttering, or

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[13] R15 at 1098-1100.

[14] Because we interpret § 513 as not requiring counterfeits to bear a similitude to genuine securities, we do not express an opinion on the validity of Prosperi's counterfeiting convictions had we interpreted § 513 differently.

possessing a counterfeit security in violation of 18 U.S.C. § 513(a) will be reinstated.

D. Prejudicial Spillover

Prosperi argues his convictions on the tax counts were impermissibly tainted by the substantial evidence admitted on the mail fraud and money laundering counts that were dismissed before submission to the jury. The Government acknowledges that the counterfeiting and tax counts were both predicated on the Holigolf transaction, but argues that nonetheless the evidence regarding the other transactions would have been admitted under Federal Rule of Evidence 404(b)[15] as evidence of Prosperi's intent to deceive Donovan on the counterfeiting counts.[16] Prosperi counters that if the evidence could have been admitted under Rule 404(b), the judge would have had to have given a limiting instruction to the jury, which he did not do.

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15 Federal Rule of Evidence 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

16 The Government also proffers an argument that the evidence would have been admissible to impeach Prosperi, even though all the spillover evidence was admitted in the Government's case-in-chief. We need not address the merits of this argument, however, in the wake of our conclusion that the spillover evidence would have been admitted under Rule 404(b).

Dismissal of some counts charged in the indictment does not automatically warrant reversal of convictions reached on remaining counts. *See United States v. Pelullo*, 14 F.3d 881, 897 (3d Cir. 1994); *United States v. Friedman*, 854 F.2d 535, 581 (2d Cir. 1988). Rather, a reviewing court must consider whether the convictions were the result of prejudicial spillover: that is, was there evidence (1) that would not have been admitted but for the dismissed charges and (2) that was improperly relied on by the jury in their consideration of the remaining charges. *See United States v. Rooney*, 37 F.3d 847, 856 (2d Cir. 1994).

Because we have reinstated Prosperi's counterfeiting convictions, the first step in our inquiry will focus on whether potentially prejudicial evidence was admitted that would not otherwise have been admitted for either the counterfeiting or the tax counts. Prosperi contends that all the evidence regarding the Inlet Drive, Royal Palm, and Refinancing transactions was admitted to establish Prosperi's scheme to defraud Donovan, a necessary predicate to a mail fraud conviction. According to Prosperi, after the mail fraud-related counts were dismissed, there was no longer a proper basis for admitting evidence of these transactions. The Government persuasively argues, however, that evidence of these other transactions would have been admitted properly under Federal Rule of Evidence 404(b), either as inextricably intertwined with the counterfeiting counts or as evidence of Prosperi's intent to deceive Donovan. Because Prosperi's creation of counterfeited CDs was only part of an ongoing plan to deceive Donovan and plunder his assets, evidence of Prosperi's other deceptions was inextricably intertwined with the evidence supporting the counterfeiting counts. *See United States v. Lehder-Rivas*, 955 F.2d 1510, 1515-16 (11th Cir. 1992) ("Evidence of criminal activity other than the charged offense is admissible for purposes of Rule 404(b) if it: 'pertain[s] to the chain of events explaining the context, motive and set-up of the crime [and is] linked in time and circumstances with the charged crime, or forms an integral

and natural part of the crime, or is necessary to complete the story of the crime for the jury.'") (quoting *United States v. Van Dorn*, 925 F.2d 1331, 1338 (11th Cir. 1991)).

In the alternative, the evidence of the other transactions could have been admitted under Federal Rule of Evidence 404(b) to establish Prosperi's intent to deceive Donovan with respect to the counterfeiting counts. Prosperi argues the Government had substantial evidence of Prosperi's intent to deceive Donovan from the circumstances surrounding the relevant Holigolf transaction, and that duplicative evidence would have been excluded by the district court under Federal Rule of Evidence 403.[17] Exclusion of evidence under Rule 403 is within the discretion of the district court, *see United States v. Cross*, 928 F.2d 1030, 1048 (11th Cir. 1991), and this court will not speculate on what the district court would have done had a Rule 403 objection been raised.

Even had the contested evidence not been admitted under Rule 404(b), Prosperi's claim would fail on the second step of our inquiry, as there is insufficient indication in the record that Prosperi's convictions on the tax counts were prejudicially influenced by evidence of the other transactions. In evaluating claims of prejudicial spillover, we consider several factors that would indicate whether prejudice tainted the jury's verdict. First, we consider whether the jury meticulously sifted the evidence admitted for all counts. *See United States v. Miranda*, 197 F.3d 1357, 1359 (11th Cir. 1999) (per curiam); *United States v. Stefan*, 784 F.2d 1093,

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[17] Federal Rule of Evidence 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

1101 (11th Cir. 1986). Relevant to this inquiry is the similarity of the evidence introduced for the separate counts: distinct evidence is less likely to result in prejudicial spillover. *See Pelullo*, 14 F.3d at 898. A discriminating acquittal also can signal that the jury was able to sift through the evidence properly. *See United States v. Eason*, 920 F.2d 731, 737 (11th Cir. 1990); *see also Pelullo*, 14 F.3d at 899. Second, we examine whether the contested evidence was inflammatory in nature, and thus liable to prejudice the jury. *See Rooney*, 37 F.3d at 855. Third, we consider whether admission of the other evidence significantly altered the defendant's trial strategy. *See United States v. Ivic*, 700 F.2d 51, 65 (2d Cir. 1983). Finally, we assess the strength of the evidence against the defendant on the remaining counts. *See Rooney*, 37 F.3d at 856.

Application of these factors to the evidence in this case suggests that no unfair prejudice resulted. The jury convicted Prosperi on all five counts under its consideration, and the evidence supporting the tax counts resembled that supporting the other counts, involving as they both did embezzlement from Donovan. The jury was able to sift through the evidence presented, however, as evidenced by its delay in reaching a unanimous verdict on the tax counts after finding Prosperi guilty of the counterfeiting counts.[18] In addition, the

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[18] Prosperi finds evidence the jury was incapable of sifting through the evidence in its request for evidence Prosperi contends did not pertain to the remaining counts. During deliberations, the jury requested the transcript pages concerning purported loan checks from Perth Holdings, Ltd., to Amaretto. Prosperi's counsel objected on relevancy grounds. The court, finding the evidence relevant to Prosperi's intent to defraud Donovan with regard to the counterfeit securities, overruled the objection. Because the jury announced its uncertainty on the tax counts after requesting and receiving this evidence, there is no indication the jury was unable to properly sift through the evidence. Furthermore, this note was only one of many

[Footnote continued on next page]

evidence of Prosperi's other misdeeds, all of the "white collar" variety, is not the type that would ordinarily inflame or prejudice a jury. Indeed, the jury's hesitation and continued deliberation on the tax counts after reaching a verdict on the counterfeiting counts strongly suggests the jury was not inflamed or prejudiced by the spillover evidence. And other than a bare assertion that he might not have testified, Prosperi presents no reasonable explanation that his trial strategy was altered by the admission of the other evidence. Finally, notwithstanding the jury's initial hesitation in delivering a guilty verdict, our review of the record shows the evidence supporting the tax counts was substantial.

Prosperi emphasizes the fact that the district court did not strike any of the evidence or provide a limiting instruction. Limiting instructions by the court to the jury may provide further assurance that the jury did not consider improper evidence. *Cf. United States v. Adkinson*, 135 F.3d 1363, 1373 (11th Cir. 1998) (expressing concern that "the government's evidence remained in; none was stricken. There was no instruction to the jury to disregard any of it. If this strategy is sanctioned, the rules of evidence provide little protection against conviction by inadmissible evidence.") (footnote omitted). Here, in light of the district court's decision that the evidence of the Inlet Drive, Royal Palm, and Refinancing transactions was admissible to establish Prosperi's intent to deceive Donovan, the court's failure to provide a specific limiting instruction is hardly remarkable.

Although Prosperi challenges the sufficiency of the district court's instructions, he neither submitted proposed

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[Footnote continued from previous page]
sent by the jury, the number and substance of which exhibit the jury's careful consideration of the evidence.

jury instructions nor objected to the instructions delivered. In addition, the district court did instruct the jury that:

> A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the offenses charged should not affect your verdict as to any other offense charged.[19]

Only after the jury had been deliberating for several hours did defense counsel request a further instruction to the jury "that they are not to consider evidence that doesn't pertain to the remaining charges" because of concern the jury "may well be considering a lot of evidence which is no longer part of the case."[20] The Government objected on the ground that all the evidence admitted was relevant to Prosperi's intent to deceive Donovan under the counterfeiting counts. The court declined to instruct the jury further, reasoning:

> The evidence that came in related to pending charges at the time, so there was certainly no error in allowing the evidence to come in at the time.
>
> The jury was instructed that they only had the two charges, that is, the tax charges and the counterfeit security charges, so I think they understand that clearly.
>
> Furthermore, by the closing argument of counsel, they directed the jury to what were the only remaining issues, and I think they clearly understood closing argument of counsel in that regard.

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19 R32 at 4787.

20 R33 at 4794.

> The indictment still does charge the defendant with defrauding Mr. Donovan, and of course, it's confined to the counterfeit securities, but the other actions with regard to the financial statements–not financial statements, bank statements, was really not argued to the jury because it would be outside the scope of the indictment.
>
> Conceivably it could be to show intent to defraud in regard to other matters. They understand that this issue is no longer before them. I think the jury understands its function and its duty and it would be very difficult at this point to go through and remove exhibits from the jury or to give them further instructions at this point. I think they have had all the proper instructions, so I will deny the defendant's motion.[21]

The evidence of the Inlet Drive, Royal Palm, and Refinancing transactions would have been properly admitted as either inextricably intertwined with the counterfeiting counts or as evidence to establish Prosperi's intent to deceive Donovan with respect to the counterfeiting counts. Moreover, the record shows that there was sufficient evidence, excluding the spillover evidence, to support Prosperi's convictions on the tax counts and that the jury's verdict was not the result of unfair prejudice. Accordingly, we affirm Prosperi's convictions on Counts XIV and XV.

E. Extrinsic Acts Evidence

Prosperi argues that evidence of his failure to file other tax returns, omissions not pleaded in the indictment, contravened Federal Rule of Evidence 404(b). At trial, IRS Special Agent Jaque Nichols testified that Prosperi did not file a trust return for the Royal Palm property in 1988 or 1989 or a corporate

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21 *Id.* at 4796-97.

return for Amaretto in 1989.[22] Defense counsel's objections to this testimony on Rule 404(b) grounds were denied. Evidence of extrinsic offenses properly may be admitted if relevant to an issue other than the defendant's character and if its probative value is not substantially outweighed by the danger of unfair prejudice. *See United States v. Veltmann*, 6 F.3d 1483, 1499 (11th Cir. 1993). A district court's decision to admit such evidence will not be reversed absent a clear abuse of discretion. *See United States v. Edwards*, 696 F.2d 1277, 1280 (11th Cir. 1983).[23] Here, the district court found the evidence was not admitted to impermissibly establish propensity, but rather to prove Prosperi's criminal intent as manifested by his misrepresentations to a bank and Amaretto's tax attorney that the tax returns had been filed.[24] We cannot say this determination was a clear abuse of discretion.

III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's order of acquittal on Counts III-V, AFFIRM Prosperi's conviction on Counts XIV and XV and REMAND for resentencing in accordance with this opinion.

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22 R20 at 2018-29.

23 Prosperi also argues the Government conceded this issue by failing to address it in its brief. Even if the Government waived its right to argue the propriety of the extrinsic acts evidence, we would not reverse on this ground without independent consideration.

24 *See* R20 at 2020-22; *id.* at 2025-27.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 96-8086-CR-RYSKAMP

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARNOLD PAUL PROSPERI,

Defendant.

FILED

MAR 26, 1998

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ORDER GRANTING ACQUITTAL AS TO COUNTS III, IV, & V

THIS CAUSE came before the Court upon Defendant's Motion for Judgment of Acquittal **[DE 173]**, filed November 26, 1997. The defendant, Arnold Paul Prosperi ("Prosperi" or "Defendant"), contends that his convictions on Counts III, IV, and V are defective, because the government failed to prove that he "counterfeited securities of an organization" in violation of 18 U.S.C. § 513. This Court concurs. Defendant's convictions on Counts III, IV, and V are hereby reversed.

DISCUSSION

Defendant makes two arguments attacking his conviction for counterfeiting securities under 18 U.S.C. § 513 ("§ 513").[1] First, Defendant contends that the Government

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[1] 18 U.S.C. § 513 provides in relevant part:

[Footnote continued on next page]

did not produce any evidence, much less proof beyond a reasonable doubt, that the three documents identified in the indictment met the well-settled test of "counterfeited" within the meaning of § 513. Second, Defendant contends that the evidence failed to establish that the documents in question purported to be securities "of an organization" for purposes of § 513.

I. Were The Documents "Counterfeited" Within The Meaning Of 18 U.S.C. § 513?

Defendant argues that his conviction should be overturned, because the government failed to prove that he made, uttered, or possessed "counterfeited" securities for purposes of § 513. Specifically, Defendant asserts that the CDs can not be counterfeited under the statute (1) because they do not bear sufficient physical likeness to genuine CDs to deceive an ordinary person, and (2) because the jury heard no evidence that would support a physical resemblance finding. Brief in Support of Motion for Reconsideration at 2.

[Footnote continued from previous page]

(a) Whoever makes, utters or possesses a counterfeited security . . . of an organization, . . . with intent to deceive another person [or] organization . . . shall be fined under this title or imprisoned for not more than ten years, or both. . .

(c) For purposes of this section—

(1) the term "counterfeited" means a document that purports to be genuine but is not, because it has been falsely made or manufactured in it entirety;

Thus, to successfully prosecute a defendant under § 513, "the government must prove that the defendant: (1) made, uttered, or possessed (2) a counterfeit security (3) of an organization (4) with intent to deceive another person, organization, or government." *United States v. Chappell*, 6 F.3d 1095, 1099 (5th Cir. 1993), *cert. denied*, 510 U.S. 1183 (1994).

The applicability of a physical resemblance inquiry or "similitude test" has been recognized by courts in various other counterfeiting statutes. However, there is no record of the similitude test having been addressed in the context of § 513.

The Government acknowledges the applicability of a sort of physical resemblance test under § 513, but urges the Court to apply the test by focusing primarily on the "fooling quality" of the subject CDs. The Government places great emphasis on whether a reasonable person, like, the Government argues, Mr. Donovan in the instant case, could be deceived by the documents. The Government argues that the similitude standard does not apply in § 513, and that the issue is not whether "the challenged documents bear striking a resemblance [sic] to the genuine article." Government's Response at 5. The Government contends that the similitude standard has only been applied "in decisions that relate to counterfeiting implements under 18 U.S.C., § 474 or to statutes that do not define the meaning of the word 'counterfeit.'"

> The counterfeiting cases, and particularly cases involving 18 U.S.C. § 474, impose a similitude requirement because the statute itself dictates that analysis. Under Sec. 474, the statute itself imposes a "similitude" element that is *not* present in 18 U.S.C. § 513. (emphasis in original)

Government's Response at 5. However, the Government recognizes that the phony documents must satisfy some test of physical similarity, "whether or not the challenged documents *were sufficiently similar* to fool someone becomes very important in determining if the documents actually purported to be genuine." *Id.* at 6; *citing United States v. Parr*, 716 F.2d 796 (11th Cir. 1983). Essentially, the parties argue not over the standard, both parties cite *Parr* and speak generally of two primary elements in the counterfeiting standard (similarity and deception). Rather, the parties

dispute what is required by the standard. The Government argues for some minimal physical similarity test, that is satisfied if a reasonable person is deceived, while Defendant contends that the phony documents must pass an objective physical similarity test or "similitude" test.

It is left for this Court to determine what must be shown to establish that securities are "counterfeited" under § 513. It is well settled that penal statutes are subject to strict construction. *Donnelley v. United States*, 276 U.S. 505, 511, 48 S. Ct. 400, 401, 72 L. Ed. 676 (1928); *United States v. Strauss*, 285 F.2d 953, 955 (5th Cir. 1960). Such laws are to be interpreted strictly against the prosecution and liberally in favor of the accused. *Id.*

While the statute expressly defines its use of the term "counterfeited" in § 513(c), no court has determined whether the similitude standard applies. The instant matter puts this question squarely at issue. Accordingly, the Court will address the definition of "counterfeited" in § 513, specifically as relates to the applicability of the similitude standard, as a matter of first impression.

A. Does § 513 Require Similitude?

Unlike other counterfeiting statutes, § 513 defines the term "counterfeited" as it is used in the statute. A security is "counterfeited" if it "purports to be genuine but is not, because it has been falsely made or manufactured in its entirety." § 513(c). The legislative history of § 513 reveals that this definition "carries forward the general view that, in order for an article to constitute a counterfeit, it need only bear such a likeness or resemblance to the genuine article 'as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be upright and honest.'" Senate Report of the Committee on the Judiciary, Criminal Code Reform Act of 1981, No. 97-307, 97th Cong. § 1741 at 775-776 (*citing United States v. Lustig*, 159 F.2d 798 (3rd Cir. 1947), *rev'd on other grounds*, 338 U.S. 74 (1949)); *United States v.*

Chodor, 479 F.2d 661, 664 (1st Cir.), *cert. denied*, 414 U.S. 912 (1973); *United States v. Smith*, 318 F.2d 94 (4th Cir. 1963); *United States v. Gettman*, 44 F. Supp. 360 (D. Minn. 1942). The definition carried forward and applied by Congress in § 513 is more commonly referred to in counterfeiting cases as the "similitude test" or "similitude standard."[2] *Parr*, 716 F.2d at 807. Finding that the similitude standard is applicable in the context of the instant prosecution under § 513, it is incumbent on this Court to determine exactly what the similitude standard requires.

B. What Does the Similitude Standard Require?

The Government would have this Court strip the similitude standard of its well-established physical resemblance test. The Government acknowledges that the standard applies, citing the standard as identified in *Parr*, but refuses to call it a similitude test and to apply an objective physical likeness inquiry. Government's Response at 5. The Fourth Circuit opinion in *Smith* is the seminal case providing a practical explanation of what the similitude standard requires in counterfeiting cases. In *Smith*, defendant Smith ran a confidence scheme that involved the sale of a machine to make money. At the time of his arrest Smith had in his possession two slips of paper the size of a $10.00 Federal Reserve note. The front of each note bore a faint, reverse

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[2] The similitude standard has been widely applied by courts to cases involving various sorts of documentary imitations. *See, e.g.*, *Lustig*, 159 F.2d at 801, *Smith*, 318 F.2d at 94, *Chodor*, 479 F.2d at 664, and *Parr*, 716 F.2d at 807 (applying this standard to counterfeit currency cases); *United States v. Parnell*, 581 F.2d 1374, 1381 (10th Cir. 1978) (similar; cashier's checks), *cert. denied*, 439 U.S. 1076, 99 S. Ct. 852, 59 L. Ed. 2d 44 (1979); *United States v. Anderson*, 532 F.2d 1218, 1224 (9th Cir.) (similar; stock certificates), *cert. denied*, 429 U.S. 839, 97 S. Ct. 111, 50 L. Ed. 2d 107 (1976); *United States v. Gomes*, 969 F.2d 1290 (1st Cir. 1992) (similar; social security cards).

facsimile, of a Federal Reserve note. The backs were blank. The prosecution in *Smith* stressed that only two elements needed to be established to convict for counterfeiting obligations under the 18 U.S.C. § 472, possession and intent to defraud. Rejecting that argument, the court relied on a dictionary definition of counterfeited, "imitated, simulated, feigned or pretended," *Smith*, 318 F.2d at 95 (citing, 2 Oxford Dictionary 1066 (1933 ed.)), to find that a showing of physical resemblance was required to convict under the counterfeiting statute. *Id.* The Court then ruled as a matter of law that the two slips of paper were not counterfeits. *Id.* "They [had] too little likeness to be genuine . . . , [and] did not have the appearance of an obligation of the United States." *Id.* at 94-95.

This Circuit has directly addressed the similitude standard in counterfeiting cases on two occasions. In *United States v. Turner*, 586 F.2d 395 (5th Cir. 1983), *cert. denied*, 440 U.S. 926, 99 S. Ct. 1258, 59 L. Ed. 2d 480 (1979), the defendant was prosecuted under 18 U.S.C. § 474, which expressly provides for a similitude requirement in the statute.[3] The defendant was prosecuted for use of bogus bills, which were photo copies of the face of genuine one dollar bills on black and white paper, and were intended to be used to obtain

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[3] In *Bonner v. Prichard*, 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit adopted as precedent all opinions of the Fifth Circuit rendered prior to October 1, 1981.

18 U.S.C. § 474 reads in pertinent part:

> Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with the intent to sell or otherwise use the same; . . . Shall be fined not more than $5,000 or imprisoned not more than 15 years, or both.

change from a change-making machine. Defendant appealed his counterfeiting conviction arguing that "as a matter of law, the photocopies were too crude to constitute the sort of phony obligations whose possession is proscribed [in the counterfeiting statute]." *Id.* at 397. The *Turner* court cited the language of the similitude standard as applied in *Smith* and affirmed the conviction. The court chose not to apply an objective resemblance/likeness inquiry, but solely focused on the fooling quality of the bogus bills.

> While the appellant has correctly perceived that [a physical resemblance] standard has generally been invoked in past counterfeiting cases to evaluate the quality of phony bills, we do not think that this case requires further speculation regarding the capacity of these illicit bills to deceive . . . . The vending company's president testified that these change machines are designed to accept only real dollar bills. Thus the photocopies involved here have unequivocally demonstrated their dangerousness.

Id. at 397-98.[4] The *Turner* court's unwillingness to apply the usual objective physical similarity test in this instance can be explained by the peculiarity that the deceived thing was a machine and not an individual. As applied to a machine, the physical likeness of the phony bill was sufficiently similar to

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[4] In *United States v. Ross*, 844 F.2d 187 (4th Cir. 1988), the Fourth Circuit reached the opposite conclusion in a case mirroring the facts in *Turner*. The *Ross* court analyzed *Turner* and concluded that the Fifth Circuit had inappropriately applied a test of "dangerousness" into the definition of counterfeit. The *Ross* court also noted that the defendants in the two cases were prosecuted under different statutes. The *Ross* court, relying on the similitude standard of *Smith*, concluded that the poor quality of the black and white photocopies of the bills precluded prosecution for counterfeiting, even if the change machines would accept them.

a genuine bill to satisfy the similitude inquiry. The bill's physical properties bore sufficient likeness to deceive a sensible and unsuspecting machine, even if they would not have fooled a sensible and unsuspecting person. Because the machine was designed to accept only real bills, the sufficiency of the bogus bill's likeness, for purposes of the similitude test, could only be demonstrated if the machine was in fact deceived. If the machine did not accept the bill, then the phony bill would not bear a sufficient likeness to deceive as required under the similitude standard. By exclusively evaluating this deception element, the *Turner* court could find that the similitude standard of *Smith* had been met. This analysis does not discount the *Turner* precedent altogether in cases where persons are the deceived. Evidence that a person was deceived by a counterfeit may bear directly on the issue of the quality of the counterfeit, that is, whether the bogus item is in fact an imitation that sufficiently resembles a genuine article. *See United States v. Johnson*, 434 F.2d 827, 829 (9th Cir. 1970); *United States v. Gomes*, 969 F.2d 1290, 1294 n.2 (1st Cir. 1992).

United States v. Parr, 716 F.2d 796 (11th Cir. 1983) demonstrates that the Eleventh Circuit applies the similitude standard and its usual physical resemblance test to counterfeiting cases where machines are not the intended victims. In *Parr*, a defendant was convicted of making and possessing counterfeit ten dollar bills in violation of 18 U.S.C. § 474, the same statute at issue in *Turner*. On appeal, the defendant argued that there was insufficient evidence to prove similitude under the statute because, at the time of trial, the bill's color had a purplish hue, rather than the green coloration of an authentic one. The Eleventh Circuit upheld the conviction, noting that the government had elicited testimony from an expert that the discoloration was a product of fingerprint analysis. In its opinion, the Eleventh Circuit emphasized the importance of such expert evidence, because it informed the jury regarding the physical characteristics of the phony document and aided their finding of similitude.

> The note and the testimony were introduced to *provide a basis for the jury to decide whether or not the note sufficiently resembled* an obligation of the United States. Appellant had an opportunity to cross-examine the witnesses and indeed was successful in bringing out what he has characterized as certain inconsistencies in the fingerprint expert's testimony as to the original color of the note. *Any such inconsistencies properly were before the jury to take into account in assessing whether the note was a "similitude" of an obligation of the United States* . . . . Based on this evidence, the jury concluded that the note qualified as a "similitude" of an obligation of the United States.
>
> The note in question, especially in view of the testimony explaining the absence of the purplish hue overlying it, is far too similar to an authentic note for us to conclude that the jury could not have found that it satisified the "similitude" standard of *United States v. Turner, supra.* Accordingly we find that there was sufficient evidence on the similitude issue.

Id. at 807 (emphasis added). Thus in *Parr*, the Eleventh Circuit ruled that a physical resemblance finding by the factfinder was necessary to satisfying the similitude standard. This result is consistent with other courts' applications of the similitude test. *See, e.g., United States v. Smith*, 318 F.2d 94, 95 (4th Cir. 1963); *United States v. Chodor*, 479 F.2d 661, 664 (1st Cir.), *cert. denied*, 414 U.S. 912, 94 S. Ct. 254, 38 L. Ed. 2d 151 (1973); *United States v. Parnell*, 581 F.2d 1374, 1381 (10th Cir. 1978), *cert. denied*, 439 U.S. 1076, 99 S. Ct. 852, 59 L. Ed. 2d 44 (1979); *United States v. Anderson*, 532 F.2d 1218, 1224 (9th Cir.), *cert. denied*, 429 U.S. 839, 97 S. Ct. 111, 50 L. Ed. 2d 107 (1976); *United States v. Brunson*, 657 F.2d 110, 114 (7th Cir. 1981), *cert. denied*, 454 U.S. 1151, 102 S. Ct. 1019, 71 L. Ed. 2d 306 (1982). Accordingly, in the instant matter for Defendant to be convicted for having made, uttered, or possessed

"counterfeited" securities, the factfinder must be presented with evidence allowing it to find objective similitude between the phony securities and genuine securities.[5]

C. Applying The Similitude Standard In The Instant Case

Defendant contends that the conviction under § 513 must be overturned because the Government failed to offer evidence regarding what genuine CDs look like. Defendant argues that this evidence was a necessary prerequisite to finding similitude, and therefore to convicting Defendant on the § 513 counterfeiting charge. Defendant posits that the jury "would have known, at a glance, that the questioned documents were missing [a] fundamental feature of a certificate of deposit, [namely, the issuer's signature]." Memo. in Support of Acquittal at 12. The Government asserts that the jury had a "multitude of evidence that clearly supports each of [its] verdicts." Government's Response at 4. It notes that the evidence before the jury included the bogus CDs and testimony from various individuals regarding the subject CDs.

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[5] In *United States v. Rosnow*, 977 F.2d 399 (8th Cir. 1992), a case not cited by either party in this matter, the Eighth Circuit stated that "there is no similarity requirement for counterfeits in cases involving less recognizable instruments such as government checks and drafts." *Id.* at 410 (citing *Buckner v. Hudspeth*, 105 F.2d 393, 395 (10th Cir. 1939). The *Rosnow* case involved the possession of "Counterfeit Sight Drafts" purportedly payable as an obligation of the United States through the Commissioner of the IRS. The Tenth Circuit's ruling of no similarity requirement appears to be anomalous. The *Buckner* case from which *Rosnow* claims to draw this rule does not seem to support it, but appears to require physical resemblance finding, "[forgery is constituted] . . . if the instrument is made with the intent to defraud and *shows on its face that it has sufficient efficacy* to enable it to be used to the injury of another." *Id.* at 395 (emphasis added).

The standard by which this court is to judge the sufficiency of the evidence to sustain a conviction was given by the Eleventh Circuit in *Parr*, 716 F.2d at 806-807 (footnotes omitted). It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. *Id.* A jury is free to choose among reasonable constructions of this evidence. *Id.* at 806-7 (footnote omitted). In assessing whether this standard is met we must consider the evidence in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80, 62 S. Ct. 457, 469, 86 L. Ed. 680 (1942); *United States v. Henderson*, 693 F.2d 1028, 1030 (11th Cir. 1982).

1. Features Of The Phony CD Versus A Real One

The similitude requirement does not criminalize only masterpieces. "[T]here is no requirement that the challenged products be paradigmatic likenesses of . . . perfection." *United States v. Brunson*, 657 F.2d 110, 114 (7th Cir. 1981), *cert. denied*, 454 U.S. 1151, 102 S. Ct. 1019, 71 L. Ed. 306 (1982). The charged documents may well lack some of the features of the authentic or genuine. *See, e.g., Chodor*, 479 F.2d at 664 (sufficient evidence to find fake ten-dollar bill to be a counterfeit where, despite absence of serial number and treasury seal, bogus bill resembled genuine currency); *Turner*, 586 F.2d at 397-98 (black and white reproductions printed on one side only were sufficiently authentic to be illegal "counterfeits"); *United States v. Anderson*, 359 F. Supp. 61, 66, (E.D. Ark. 1973) (evidence supported conviction for counterfeiting corporate bonds where fake documents were "adequate similitudes" of genuine bonds). The First Circuit applied these principles more recently in setting aside a defendant's conviction for possessing counterfeit social security cards. In *United States v. Gomes*, 969 F.2d 1290 (1st Cir. 1992), the cards at issue contained the heading "SOCIAL SECURITY" in large white letters;

but were missing several essential features of genuine social security cards, including printed nine-digit numbers, printed names, and holders' signatures. The court reasoned:

> Although a bogus document cannot be considered a counterfeit unless it possesses enough verisimilitude to deceive the ordinary person, the law does not criminalize only masterpieces. Thus, to run afoul of the counterfeiting laws, a copy does not have to be an artistic triumph or so good an imitation as to baffle an expert.

Id. at 1293. The Court reversed the conviction noting the cards' obvious incompleteness and concluding that the cards "could not, as a matter of law, be considered counterfeit." *Id.* at 1295.

In the instant matter, the three fraudulent CDs were printed on letterhead of J.P. Morgan and the Morgan Guaranty Trust Company of New York, and contained features such as (1) the certificate holder's name; (2) an identifying number; (3) an opening date on which the certificates were purchased; (4) a maturity date; (5) a principle amount; (6) an interest rate; and (7) a statement that the certificate was subject to penalties for early termination.[6] However, some regular and essential features of authentic CDs were not present on the phony ones. The bogus CDs did

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[6] The Court notes that evidence adduced at trial shows that the defendant gave Mr. Donovan other documents over the course of their relationship that contained virtually the identical information as the counterfeit securities. *See* Citibank documents dated 4/7/93 (Government Exhibit 11) and 4/8/94 (Government Exhibit 12). Unlike the phony CDs, these documents are entitled "Your Account Statement" and not "Certificate of Deposit." Despite the similar information provided in each, the Government has not contended that these documents were counterfeited securities, but has characterized them as "statements". *See* Tr. Vol. 4 at 482.

not contain the signature of the maker or drawer. The documents also did not possess a full statement of terms and disclosures as do most valid CDs. Such disclosures often define terms and provide rate information, compounding frequency, minimum balance requirements, balance computation methods, renewal policies, and the like. The general appearance and information contained in the bogus documents gives the impression of a homemade document, crudely typed with the barest of features that one would expect in such a valid and binding negotiable instrument—not even a signature from the supposed issuer is present. This is noticeably unlike a real CD, which appears in the likeness of a formal legal contract and is signed by the issuer.

The Government argues that absence of a single feature, even if it is a signature, does not preclude a finding of similitude or otherwise negate a counterfeiting conviction. It points to the circuit court's ruling in *United States v. Webb*, 443 F.2d 308 (5th Cir. 1971), where a counterfeit check passed by a defendant lacked the signature of the maker, yet was found by the court to be a "security" for purposes of 18 U.S.C. § 2314. The court found that the check had "most" of the attributes of a check and had been accepted in good faith as a genuine security. However, *Webb* is a forgery case. Forgery statutes do not demand an objective similitude test as is commonplace in counterfeiting statutes, but only require an "appearance of validity upon its face as to enable it to be used to the prejudice of another." *Id.* at 310. The Court's attention is also drawn to *United States v. Hanna*, 1995 WL 66616 (S.D.N.Y. 1995), where a defendant was convicted of counterfeiting a New York Life check under the same statute at issue presently, § 513. In *Hanna*, the jury heard evidence from a New York Life representative that the check bore no resemblance to any of its real checks, because it did not contain a number of specific markings required by New York Life. *Id.* at *3. However, the jury determined the checks to be counterfeited, and the district court denied the defendant's argument that there was insufficient proof of counterfeiting.

While it is apparent that the jury heard evidence relating to the physical similitude of the check, the *Hanna* opinion provides little insight for this Court because it does not address the totality of the evidence heard by jury. This Court can only presume that the evidence offered allowed the jury to find sufficient resemblance between the counterfeit New York Life check and a genuine check. In any event, it appears that the jury in *Hanna* was presented both the real check and the phony one, so as to allow it to conclude that the phony was counterfeit for purposes of § 513. *Id.*

While this Court notes the deficiencies of the phony CDs, it can not say as a matter of law that they fail to meet the similitude requirement. The phony CDs did possess many of the essential terms of valid CDs and were able to deceive Mr. Donovan in some measure.[7] While this Court notes their shortcomings, it does not find the discrepancies so obvious as would cause the CDs to fail the similitude test as a matter of law. Because this case involves counterfeit securities, before reversing a jury's verdict this Court would require a greater showing of disparity between the phony and the genuine documents than might be required in other contexts. The physical features of securities vary by institution and are not

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[7] The extent to which Mr. Donovan was actually deceived by the phony CDs is unclear as the trial record indicates that he received numerous records, account statements, and other financial data from the Defendant. For sure, Donovan thought he owned CDs. Tr. Vol. 3 at 438, 441. The extent to which Donovan actually looked at and evaluated these particular fraudulent documents or depended on oral representations of the Defendant is unclear. It should be noted that Donovan was not giving consideration in exchange for the securities which is a usual factual scenario in a counterfeiting case. When consideration is given, a heightened examination of the security would be expected. The bogus CDs were given to Donovan much like a receipt would be given. The "securities" were a record showing that his money was on deposit and earning interest.

commonly familiar to the average person. These factors allow a less representative security more leeway under the similitude standard than would be given a counterfeit of a commonly known instrument such as money.

However, the jury must be presented with evidence that would allow it to determine whether the bogus documents sufficiently resembled genuine ones. In the instant case, evidence of the real versus the phony CD was not presented. The jury was shown the phony CDs and concluded that they were counterfeited. However, they were not provided a valid CD with which to compare the phony. This is essential in a counterfeit securities case, as the court can not expect the common juror to have a accurate notion of the appearance of a security. Unlike currency cases in which a court may presume that the general populace has sufficient experience to know the characteristics of a genuine dollar bill, most persons could not identify the distinguishing attributes of a CD. If the jury could have seen both the valid and the phony, it is possible that it would have concluded that the objective similitude requirement was not met. So then, it is left to this Court to determine if witness testimony provided sufficient evidence upon which to find that the subject CDs were counterfeited.

2. Other Evidence And Witness Testimony As To The CDs' Similitude

Defendant posits that because the Government did not present the jury with a likeness of a real CD, it should have presented the jury with expert testimony to establish similitude. An expert did not testify at trial as to the resemblance of the phony CDs versus real ones, however the Government believes that enough evidence was gleaned from other evidence and the testimony of other witnesses for the jury to have found that Defendant counterfeited the CDs.

The Government cites testimony and evidence of two letters purporting to be from J.P. Morgan officials and referring to the bogus CDs. These letters refer to the phony

CDs and were intended to "convince Donovan of the genuine nature of J.P. Morgan certificates." Government's Response at 9. J.P. Morgan vice president Gary Adkin testified at trial that he could understand how an individual might identify one of the forged letters, allegedly signed by him, as an authentic. Tr. Vol. 6 at 382. Adkin also testified that the forged letter made factual references to the bogus CDs supposedly issued by J.P. Morgan. *Id.* While this testimony and the letters evidence the Defendant's intent to deceive Mr. Donovan, they do not provide a basis for the factfinder's similitude determination.

The Government cites the testimony of another J.P. Morgan official, Sharon Adams, who testified regarding the contents of the alleged CDs, specifically that each stated a particular holder, account number, opening date, maturity date, interest rate, and a warning of an early withdrawal penalty. Tr. Vol. 7 at 1099-1100. However, like the presentation of the phony CDs themselves to the jury, Ms. Adams testimony provides the factfinder no basis for determining the physical likeness of the real CDs. It only states the contents of the phony documents.

The Government also cites the testimony of the Defendant himself, who testified, like Ms. Adams, of the contents of the bogus CDs. Tr. Vol. 21 at 4093. Defendant also testified that the information contained in the bogus CDs might be appropriate in a real CD. *Id.* Again, however, this evidence fails to bear on the objective resemblance of the phony CDs with real ones, but only admits that they share common types of information.

The Government cites to no other testimony or convincing evidence that will support the jury's finding that Defendant "counterfeited" securities under § 513. Having not been presented with evidence of the likeness of a real CD, nor presented with witness testimony as to the objective physical qualities of the phony CDs versus genuine ones, this Court finds that the jury's conviction under § 513 is unsupportable.

The evidence, even when considered in the light most favorable to the government, as required by *Glasser*, 315 U.S. at 80, 62 S. Ct. at 469, does not support the jury's finding. Accordingly, the Defendant's Motion for Judgment of Acquittal as to Counts III, IV, and V will be granted.

II. Were The Documents "Of An Organization" Within The Meaning Of 18 U.S.C. § 513?

Defendant contends that he could not have counterfeited securities under § 513 because the phony CDs were not "of an organization" as required under the statute.[8] Defendant admits that J.P. Morgan and its associated companies are organizations within the meaning of the statute. However, Defendant asserts that because these institutions do not issue CDs, he can not be convicted under § 513 for making, uttering, or possessing a counterfeited security "'of' an organization." Defendant presents a novel argument to this Court, and one in which neither party cites case law to support its substantive argument. Defendant argues that, at the very least, the rule of lenity requires the Court to adopt a construction in the defendant's favor. *Crandon v. United States*, 494 U.S. 152 168 (1990); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 (1992) (when a court is confronted with an ambiguous statute, "[i]t is proper . . . to apply the rule of lenity and resolve ambiguity in [the defendant's] favor"); *Dunn v. United States*, 442 U.S. 100, 112 (1979). The Government contends that this argument is mooted once this Court finds that J.P. Morgan is an organization under the statute. It is uncontroverted that

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[8] 18 U.S.C. § 513 provides in relevant part:

(a) Whoever makes, utters or possesses a counterfeited security . . . *of an organization*, . . . with intent to deceive another person [or] organization . . . shall be fined under this title or imprisoned for not more than ten years, or both . . . (emphasis added).

J.P. Morgan and the affiliated banking companies, as established banking institutions which offer a variety of banking services, are organizations under the statute.

In this case, J.P. Morgan does not issue CDs, a banking service commonplace at many other financial institutions.[9] Defendant would have this Court find that because there exists no genuine J.P. Morgan CD, Defendant could not have counterfeited a J.P. Morgan CD. In the context of most counterfeiting cases, Defendant's argument makes sense. To find that one has produced a counterfeit document without an existing real corresponding document would be nonsensical. However, the analysis as applied to counterfeited securities is different. The term "counterfeited" as defined in § 513 includes a document that is not genuine "because it has been falsely made or *manufactured in its entirety*." 18 U.S.C. § 513(c) (emphasis added). Accordingly, on its face this statute comprehends and includes those phony securities that are complete fabrications, yet supposedly issue from an organization. *See generally*, *United States v. Blakey*, 960 F.2d 996, 1000 (11th Cir. 1992) (noting that unlike other similar statutes § 513 proscribes a document "falsely made 'in its entirety'").

This Court can think of plausible explanations for including documents that are entirely fabricated in the counterfeit securities context. A security is unlike national currency, passports, social security cards, etc., where there exists one physical well-known standard. Securities are issued by numerous banking institutions. While there are certain essential characteristics that inure to all, no two CDs are physically identical. Because of its general characteristics and information contained therein, even the well-informed may be fooled by a counterfeit security, and

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[9] J.P. Morgan is a holding company of financial institutions rather than a bank itself.

assume it to be the genuine article. Even a securities expert will not know the specific sorts of securities offered by all financial institutions. It is less important that there exist a genuine CD issued by the institution named on the fake document, because the legitimate counterfeiting harm may be accomplished on an informed victim by simply using the name of a respected organization in a document resembling a common security, like a CD. By including documents manufactured in their entirety, § 513 covers those defendants who may use the name of an institution to perpetrate securities counterfeits, even though the institution does not issue a particular type of security. Accordingly, Defendant's argument on this point will not succeed. Defendant's phony CDs were "of an organization" for purposes of § 513.

CONCLUSION

The Court has considered the motion and the pertinent portions of the record and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that Defendant's Motion for a Judgment of Acquittal **[DE 173]** be and the same is hereby **GRANTED** as to Counts III, IV and V.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 26 day of March, 1998.

/s/
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-4605FF, 98-4692FF

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ARNOLD PAUL PROSPERI,
Defendant-Appellant.

Filed
U.S. Court of Appeals
Eleventh Circuit
Mar. 30, 2000

On Appeal from the United States
District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19__, _____F.2d____).

Before: COX, Circuit Judge, KRAVITCH, Senior Circuit Judge, and PROPST*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/

SENIOR UNITED STATES CIRCUIT JUDGE

* Honorable Robert B. Propst, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

APPENDIX D

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

* * * *

18 U.S.C. § 513 provides:

(a) Whoever makes, utters or possesses a counterfeited security of a State or a political subdivision thereof or of an organization, or whoever makes, utters or possesses a forged security of a State or political subdivision thereof or of an organization, with intent to deceive another person, organization, or government shall be fined under this title or imprisoned for not more than ten years, or both.

(b) Whoever makes, receives, possesses, sells or otherwise transfer an implement designed for or particularly suited for making a counterfeit or forged security with the intent that it be so used shall be punished by a fine under this title or by imprisonment for not more than ten years, or both.

(c) For purposes of this section—

(1) the term "counterfeited" means a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety;

(2) the term "forged" means a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents;

(3) the term "security" means—

(A) a note, stock certificate, treasury stock certificate, treasury bond, debenture, certificate of deposit, interest coupon, bill, check, draft, warrant, debit instrument as defined in section 916(c) of the Electronic Fund Transfer Act, money order, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest in or participation in any profit-sharing agreement, collateral-trust certificate, pre-reorganization certificate of subscription, transferable share, investment contract, voting trust certificate, or certificate of interest in tangible or intangible property;

(B) an instrument evidencing ownership of goods, wares, or merchandise;

(C) any other written instrument commonly known as a security;

(D) a certificate of interest in, certificate of participation in, certificate for, receipt for, or warrant

or option or other right to subscribe to or purchase, any of the foregoing; or

(E) a blank form of any of the foregoing;

(4) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, or any other association of persons which operates in or the activities of which affect interstate or foreign commerce; and

(5) the term "State" includes a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.

* * * *

26 U.S.C. § 7206 provides:

Any person who—

(1) Declaration under penalties of perjury. — Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . .

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

* * * *

Federal Rule Of Evidence Rule 606 provides:

(a) *At the trial.* – A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify,

the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into validity of verdict or indictment.* – Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

APPENDIX E

[EXCERPTS FROM TRIAL RECORD]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No.
Plaintiff,	)	96-8086-CR-RYSKAMP
v.	)	
ARNOLD PAUL PROSPERI,	)	West Palm Beach, Fl. November 5, 1997 9:00 a.m.
Defendant.	)	

VOLUME 26

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE KENNETH L. RYSKAMP

and a jury

APPEARANCES:

For the Government: STEPHEN CARLTON, ESQ.
HOWARD DARGAN, ESQ.

For the Defendant: THOMAS PUCCIO, ESQ.
ROMA THEUS II, ESQ.

Court Reporter: Richard Greenspan, CSR, RPR, RMR, CRR
United States Courthouse
West Palm Beach, 33401

[Trial Transcript Page 4799]

(In chambers)

THE COURT: What's the problem?

MR. PUCCIO: Can I wait until my client gets in here?

THE COURT: Sure. Where is he?

MR. PUCCIO: With MR. THEUS, I assume.

Judge, I had a couple of conversations with that juror who was excused, taking your Honor's suggestion that it may be helpful, and she revealed to me certain things which I think are deeply disturbing in terms of the deliberations.

First, she said to me that one if not two jurors, Mr. Levy, first of all, Morris Levy, the gentleman you might recall who didn't want to be excused going on vacation with his wife and wanted to be part of the deliberations, had made up his mind from day one and a juror he sort of palled around with, Mr.-- DJ, the fellow sitting next to him, she believed was of similar mind.

She indicated to me that Mr. Levy engineered the selection of a foreperson long before your Honor gave the jury any instructions in that regard, told the jury that it was his suggestion, this other fellow's suggestion that Tom, another juror, I think his name was Higgins be the foreperson.

I view that as a step in the deliberative process that took place without permission of the court before the deliberations and instructions, et cetera.

I also believe, your Honor, that a hearing would

[Trial Transcript Page 4800]

produce information that there was a lot of discussion about this case and peoples' minds made up beforehand.

Additionally, your Honor, I learned -- I spoke to her last night, just frankly just to see, to get a feel for the case and what she thought about the trial, et cetera. I did notice that she did make comment to the newspaper about the wayshe felt and perhaps why I talked to her.

I talked to her again this morning having slept on it because I am concerned that we have jurors there, at least one, maybe two, who prejudged the case in violation of your Honor's instructions.

I then learned this morning that one of the sitting jurors, apparently Marilyn Budd, hysterically contacted this excused juror last evening and indicated to her that she was in a state of crying and hysteria, that she was being pummeled into submission, so to speak, and cursed at, et cetera, et cetera, et cetera.

Apparently she then spoke to her again this morning, so you have two at least, based on what I was told, two contacts by a sitting juror with a person not sitting concerning the deliberations in the case and what's going on.

I believe, your Honor -- I also was told, just so – I assume it's relevant, that the present state of the jury deliberations is 10 to 2 in favor of conviction, that the -- that Ms. Budd, the hysterical juror who called, is a person

[Trial Transcript Page 4801]

voting for acquittal and that another juror, identified to me as a juror who sat in the first seat, is also a juror voting for acquittal where the others are voting for a conviction.

I looked at 23(d), your Honor, to see how this might affect this situation and I don't think that 23(d) -- I think this is a situation in which one or more jurors should be excused.

This is certainly a situation in which my client, particularly in light of the present state of affairs, is not going to consent to a jury of less than 12.

I did look quickly, I had someone look at the legislative history of 23(d) and the definition of just cause and I would indicate to your Honor that the two cases that supported the change in the statute were cases, one case in which a juror, deliberating juror had a heart attack after a six-month trial and another case in which -- I'm sorry, after a four month trial, another case after a six-month trial a deliberating juror had to be removed by a psychiatrist for health reasons.

THE COURT: If we are going to put the law into perspective, Rule 606(b) says upon inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to

[Trial Transcript Page 4802]

assent or dissent from the verdict or indictment or concerning that juror's mental processes in connection therewith, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror, or may, any juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

MR. PUCCIO: That rule I am familiar with, your Honor, impeaching a verdict. This is a different situation.

THE COURT: I didn't intend that you continue to talk with this juror. I only intended that you say -- to comment on what they thought of the case, that it might be helpful. I didn't intend that this go into anything going on in the jury room.

As far as I am concerned, nothing is going on in the jury room and I have no evidence of anything going on in the jury room and I'm not going to inquire.

Now, I can give the jury instructions not to discuss the case. If they choose to discuss the case before the case is over, they just haven't followed my instruction. It doesn't affect the validity of the jury. I imagine jurors do that all the time. You tell them not to, but that doesn't affect the validity of the verdict.

[Trial Transcript Page 4803]

MR. PUCCIO: I think if a juror violates his oath it does affect the verdict.

THE COURT: But the only way you get that is with illegal testimony under 606(b).

MR. PUCCIO: Judge, this is different because 606(b) is the codification of the old rule a juror can't impeach his or her verdict, but even under that rule you have extraneous influence here. You have a juror -- a person outside the jury giving advice to a person within the jury.

THE COURT: Did she give advice?

MR. PUCCIO: She did.

THE COURT: Then she is improper, but at that point --it may be advice as to how to proceed and we will deal with that later on, but I am not doing anything at the present time.

MR. PUCCIO: I think it's clear to me that based upon this juror's conversation with me, she had given advice to the sitting juror of how she should deal with this situation.

THE COURT: Not how to vote, but how to deal with the situation?

MR. PUCCIO: How to deal with the situation, stick to your guns kind of testimony.

THE COURT: Isn't that what you want her to say?

MR. PUCCIO: Judge, I don't want anyone to say anything. My problem is I think you have a situation where you have a tainted jury and I have never been in a case where you

[Trial Transcript Page 4804]

have a situation where jurors are talking and getting advice from people outside the jury, regardless of who it favors or who it doesn't favor, and I also think -- I don't recall a case where somebody is single-minded enough to engineer the selection of a foreperson.

THE COURT: Everybody has read the Runaway Jury and I think they are all getting carried away with that sort of stuff.

MR. PUCCIO: That may be, but that doesn't help my client.

THE COURT: You made your record.

MR. PUCCIO: My application is for your Honor to remove the juror who made up his mind or have a hearing to determine if that's the case. In the alternative, to remove one or more jurors because of these incidents. In the absence of doing that, I would move for a mistrial.

THE COURT: I will deny those motions.

I may send a note into the jury and instruct them not to discuss it, remind them that I instructed them not to discuss this case in any manner with any other person, they can only discuss it within the jury room.

MR. PUCCIO: If your Honor is going to send a note to the jury, I would like to see what the note says.

THE COURT: Basically that, you are reminded that you are not to discuss this case in any manner with anyone outside

[Trial Transcript Page 4805]

the jury room.

MR. DARGAN: We would have no objection to that.

MR. PUCCIO: It's broader than that, they shouldn't be discussing the case until all 12 are present.

THE COURT: Unless all 12 are present and with no one outside the jury.

MR. PUCCIO: Can I examine the instruction?

THE COURT: Sure, but I want to finish getting this jury picked.

(Recess at 10:20 a.m.)
(10:45 a.m., at the side bar)

MR. PUCCIO: I looked at the note. I don't have a problem with the note, but we were outside when the jury went out for recess and it was observed that that one juror who we believe was the one who was contacted by the excused juror appeared to be in tears, which corroborates what I was told, and it suggests to me, your Honor, that there is a fair amount of browbeating going on there.

THE COURT: That happens in a lot of juries.

MR. PUCCIO: It's not proper. You asked them to talk to one another civilly and to discuss the issues. People shouldn't be reduced to tears.

THE COURT: What am I going to do about it?

MR. PUCCIO: It seems to me that you could suggest to the jurors that they treat one another civilly and that if

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anyone has any conscientiously held views, that they --

THE COURT: I say that in the instructions. I say you should discuss it, don't hesitate to change your mind if you are convinced you are wrong, do not give up your honest beliefs merely to get the case over with.

MR. PUCCIO: Maybe you should give that instruction again.

THE COURT: I don't see any reason. A lot of times you can hear -- I will go outside a jury room and they are hollaring and screaming at one another, and that's part of the process. Some people are more sensitive than others. They are not used to the give and take and they may get emotional about it.

MR. PUCCIO: In this particular case, where I am advised that a juror calls last night hysterically crying and then I see this juror crying outside the courtroom, outside the courthouse, it seems to me that that's a pretty compelling case of what's going on and I would think that some instruction is in order that somebody should not be browbeaten into submission.

THE COURT: Until I get a note from the jury that says they are deadlocked or they need further instructions, I don't see any need to instruct them.

MR. CARLTON: Your Honor, I think some comment from the court is appropriate to counsel that the time to talk to

[Trial Transcript Page 4807]

the alternate juror has come and passed and I don't think any further contact should happen.

THE COURT: I think I made that happen.

MR. PUCCIO: You didn't tell me not to talk to that juror.

THE COURT: I said you could talk immediately after the trial. I didn't mean keep an ongoing conversation with her. No further contact with the alternate juror.

MR. DARGAN: Also we would request the jurors themselves be given wide berth as you had instructed previously. If there are people milling about where the jurors are spying on the jurors, we think that's inappropriate.

MR. PUCCIO: Nobody is spying on the jurors. I was outside with my client and the jurors came outside the building. I don't know what I am supposed to do, Judge, but not to pass over that other point --

(Pause)

THE COURT: This says "May we have Prosperi's testimony regarding 'loan' notation on checks being loans from Perth to Amaretto read back." I don't know where that testimony is. If the attorneys can find it --

MR. DARGAN: I know I crossed him on that extensively.

THE COURT: -- I would send it into the jury room.

MR. DARGAN: I crossed him for probably two hours on

[Trial Transcript Page 4808]

that.

THE COURT: I will just tell them to rely upon their collective memory then.

MR. PUCCIO: I would object to that.

MR. CARLTON: How is that possibly objectionable?

MR. PUCCIO: I don't know, if a juror is asking for testimony --

THE COURT: Can you all find it?

CARLTON: Do you want us to find the specific part?

THE COURT: If you can find it and redact the pages, I will send it in. I am not going to read it back. We have got other cases to go on. The only way they will get it is the written testimony.

MR. PUCCIO: Just to go back to that other point, because I don't want to waive any rights my client has, with respect to this alternate juror, and again, your Honor, in fact you encouraged us to speak to the juror, she is a private citizen now. I don't know on what basis I could be prohibited.

You understand, your Honor, I am an agent here for a client, I am not doing this because I feel like spending my evenings talking to an alternate juror, but I don't want to stupidly waive on behalf of my client -- recklessly waive on behalf of my client any interest he has.

I think I would believe he has a right to speak to her

[Trial Transcript Page 4809]

himself if he wanted to, so I don't know how I could be prevented from doing that, unless there is some rule of law that says I can't.

THE COURT: I can do it until the jury returns its verdict. Then you can talk to everybody.

MR. PUCCIO: Is there a rule--she is no longer on the jury. It doesn't raise an issue, Judge. Obviously I don't want-

THE COURT: I could do it and you could appeal me and by the time of the appeal it would be moot, but I just don't want any more contact with the person.

MR. DARGAN: I take it that would include people associated with the defendant, his family and the like?

THE COURT: Yes. Until the jury returns a verdict, I don't want any further contact with the alternate.

MR. PUCCIO: I take an exception to your ruling.

THE COURT: All right.

(Recess at 10:55 a.m.)

(12:34, jury not present)

THE COURT: The first question, have you reached an agreement as to what testimony we would send in to them?

MR. CARLTON: With regard to the government's position, we reviewed all of the transcript volumes that concern Prosperi's direct and cross-examination and we have made copies available to defense counsel and we have selected

to our best ability those portions that the government desires to have read back to the jury and as responsive to the jury's question.

THE COURT: And you have got the portions you want?

MR. PUCCIO: I have looked at them, your Honor. The biggest problem I have with them is all these pages pertain to charges that have been dismissed or on which judgment of acquittal has been entered, so I would object to the utilization of any of this material.

MR. CARLTON: Our response to that position, insofar as argument is concerned, is that this deals with the witness's credibility. It's the defendant testifying.

THE COURT: Or a scheme to defraud.

I will allow the testimony to go in.

MR. PUCCIO: If you allow it to go in, there are pages and pages having to do with that $75,000 fee. I mean, there are very few pages that relate to this note that relate to loan notation on checks.

THE COURT: I am sure they will skip over. They are looking for something. They only may be interested in a few pages, but they don't know where it is.

MR. PUCCIO: I would object to sending them anything beyond what they asked for. You note my first objection, but if we are going to go beyond that to sending them something, they should only be sent a few pages that deal directly with

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this.

MR. DARGAN: The $75,000 on cross-examination, on direct he had testified the $75,000 was a fee and on cross-examination he indicated it was a fee from Amaretto and on cross-examination I pointed out that there was no indication that this was a loan and this should have been a loan reflected on the check register, reflected on the checks, if this was a fee from Amaretto there would have been a notation that Perth was loaning money to Amaretto and that's directly what they are asking about.

MR. PUCCIO: These these have to do with '93 and '94. The indictment no longer deals with '93 and '94, it deals with '89 and '90.

MR. DARGAN: And it goes to not only credibility, but whether or not there was bona fide loans all along and the issue is significant to the tax charges.

THE COURT: I will let the government submit what they think is apropos. Are you satisfied that that's all the testimony or do you think more testimony should go?

MR. PUCCIO:. I don't want to submit more testimony, I would submit less testimony.

THE COURT: Then I will send that testimony in to them and I will respond that we are sending the testimony in.

MR. DARGAN: For the record, the pages that the government feels are relevant are pages --

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THE COURT: I am not going to point them to any pages.

MR. DARGAN: Just for the record.

From the direct examination, page 3547 through page 3564. I have looked through this and I didn't see any side bars through there and I gave copies to counsel as well.

Then in the cross-examination the government believes the relevant portions are from page 4132 through 4190, and again, I looked through these pages and did not see any side bars. I gave these to counsel about a half hour ago and if I am mistaken, please correct me, counsel, but I didn't see any side bars.

MR. PUCCIO: I just want to make sure we agree on that. I didn't see any either.

THE COURT: Okay, the next question is there a legal definition relating to the tax returns for the concept of a loan. I don't understand the question.

MR. PUCCIO: I would suggest what the jury is trying to find out is whether loans are reportable on tax returns because the charge has to do with income being reported or not reported. So I would suggest the jury be told that loans do not have to be reported on a tax return as income.

THE COURT: What do you construe the question to be?

MR. CARLTON: I vehemently disagree with that interpretation. I think what they are searching for, is there a legal definition for loan and I don't think the court can

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supply one. I think that the court can't really answer this question.

THE COURT: But they say is there a legal definition related to tax returns for the concept of loan.

MR. THEUS: Your Honor, if I might, in the pattern jury instruction for the Eleventh circuit that deals with tax evasion, I believe one of the parts of the instruction is that loans are not taxable.

MR. CARLTON: This is not an evasion, this is a 7206(1).

THE COURT: That's basically what I am going to say here. First of all, I will say I cannot give you a legal definition of the word loan. However, loans are not taxable under the income tax code.

MR. THEUS: Or not reportable as income.

MR. PUCCIO: Or do not have to be reported as income.

MR. CARLTON: I think if you are going to make that comment to the jury, your Honor, I think that you need to point out that it is up for the jurors to decide if these were loans.

THE COURT: They are not asking that I don't think.

MR. DARGAN: That is the issue, whether this was a bona fide loan.

THE COURT: Let me work this up. Just a minute.

So far I have "I cannot give you a definition of the

word 'loan.' However, loans are not required to be reported on an income tax return."

Then I will say "It is up to the jury to decide whether there was a loan."

MR. PUCCIO: I would object to that because that's not what they are asking for.

MR. CARLTON: That's balanced.

MR. PUCCIO: It's not a question of balanced, it's a question of answering what they have asked for.

MR. CARLTON: We think it's balanced.

MR. PUCCIO: That's rearguing the government's case. I object to that.

THE COURT: They are just asking for a definition, so I will leave it where it is. Okay, here we go, Betty, make copies of that.

MR. DARGAN: May we see the final version?

THE COURT: Sure.

MR. PUCCIO: Can we go out to lunch?

THE COURT: Sure, if they have your beeper number or phone number.

(Recess at 12:40 p.m.)

(3:00 p.m., jury not present)

THE COURT: You have seen the note from the jury indicating a verdict on 3, 4 and 5 and they say they are hung up on 14 and 15 and they say there is no change in the near

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future, which I don't think this warrants an Allen charge at this time. I will just tell them to continue to deliberate on counts 14 and 15.

MR. PUCCIO: For all the reasons I put on the record before, Judge, I would move for a mistrial.

THE COURT: Okay. You don't have any objection to my instruction though, right?

MR. PUCCIO: I would move for a mistrial.

THE COURT: Denied.

MR. CARLTON: With regard to counts 3, 4 and 5, is your Honor going to seal those verdicts at this time?

THE COURT: You mean to take the verdict? It's all on one piece of paper. You are afraid they will change their mind?

MR. CARLTON: No, I just inquired.

THE COURT: I have said here, "Members of the jury, please continue to deliberate on counts 14 and 15."

MR. PUCCIO: I just want to note my objection for the record.

THE COURT: Your objection is noted and overruled.

(Recess at 3:05 p.m.)

(4:00 p.m., at the side bar)

MR. PUCCIO: Your Honor, about a half hour ago the jury was excused for a break, I assume, and escorted outside the building. I have been advised that at least two people

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observed that Mr. Levy had taken Ms. Budd aside.

THE COURT: Who is Mr. Levy?

MR. PUCCIO: Mr. Levy is the gentleman who canceled his vacation to stay on the jury and who was the subject of my application this morning, who I believe based on everything I have been told, made up his mind about this case a long time ago, certainly before the evidence was concluded.

He, in the observation of two people, took Ms. Budd aside, who was the hysterical juror who called the excused juror last evening and again this morning, and they were walked away some distance from everyone else who was outside and were engaged in animated heated conversation, appeared to be arguing.

Your Honor just sent a note in earlier today saying jurors should not be deliberating about this case without everybody being present. I have two people who are willing to testify right now that they observed this.

THE COURT: You don't know what they are saying, though, right?

MR. PUCCIO: They can't read lips.

THE COURT: Maybe they were arguing about who had the better lunch.

MR. PUCCIO: Anything is possible, Judge. I try to goin all probabilities, it's pretty strong circumstantial case I think is being built here of an unfair pressure on this juror

by this Mr. Levy, who is adamant in his desire to return a guilty verdict in this case.

I would again ask for a full hearing on this matter. Absent that, I would ask for a mistrial in this matter. Any kind of juror interference like this or juror misconduct is extremely serious and I think it should be immediately addressed.

THE COURT: The only thing that I can really consider under Rule 608(b) is outside influence and it may be that at some point we will deal with the telephone call with the alternate, but this doesn't involve outside influence. These are jurors talking and we don't even know what was said at the time.

MR. PUCCIO: Judge, could I just suggest to the court, I'm sure I am fully conveying my thoughts to your Honor, who is obviously familiar with these rules, I understand that 606(b) to be that a jury can't impeach a verdict. We don't have a verdict here, so I don't think it's applicable.

THE COURT: The only thing you can even take a statement on is whether there is an outside influence. Otherwise there is no reason to interrogate them about it.

MR. PUCCIO: At this point I believe I made a prima facie case which I can prove with a couple of witnesses that jurors are violating the court's instructions, which were reiterated in writing today, that you must not talk about this

case without the jurors being present and I believe I see a situation of a juror, Mr. Levy, who is driven here to return a guilty verdict. I can only conclude that from all I have been told about him over the last 24 hours, and is now pounding away against this woman, who won't give in, at least it appears to me, on the last two counts.

THE COURT: Anything the government wants to say?

MR. CARLTON: Mr. Puccio is not complaining about the woman who obviously is still on the jury and who is in favor of the defense who was complaining about being browbeaten, he is not asking for an inquiry of her.

MR. PUCCIO: I am asking it.

THE COURT: She is one who made the call.

MR. CARLTON: Exactly.

MR. PUCCIO: Of course I am asking for an inquiry of her, Judge. I am asking for an inquiry of both parties. Just so I am clear. I mean, my view of the situation is that we have a record thus far which requires the disqualification of one, perhaps two jurors, Ms. Budd included, and I think that that's where we are in this thing.

THE COURT: Okay, I don't see the need to make any inquiry at this time, so your objection is noted and your motion for a mistrial is denied. We will await on the jury.

MR. THEUS: The court may recall the case of United States v. Heller where there was jury misconduct involved.

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THE COURT: That was where they made a racial remark.

MR. THEUS: Anti-Semitism.

THE COURT: In the River Cops case I also had a situation where the foreman of the jury realized that the jury wasn't functioning very well, so he went to the library and got a book on being a juror, brought the book back, didn't show it to anybody else, but organized he jury according to the outline in the book, marshaling the evidence, appointing a secretary and doing all this stuff, and eventually that came out and then we had a hearing on it.

That was outside influence, bringing another book into the jury room. However, he didn't show it to any other juror and the Court of Appeals said all he did was organize it in an orderly way that didn't affect the verdict, just how they handled the evidence and how they debated it.

But the Heller case I remember very well because of some juror made a racial slur against Heller being Jewish and they did set that aside, but I don't think we are anywhere close to that.

All right, thank you.

(Adjourned at 4:10 p.m. until 9:00 a.m., November 6, 1997)

[4820]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No.
Plaintiff,	)	96-8086-CR-RYSKAMP
v.	)	
ARNOLD PAUL PROSPERI,	)	West Palm Beach, Fl. November 6, 1997
Defendant.	)	9:00 a.m.

VOLUME 27

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE KENNETH L. RYSKAMP

and a jury

APPEARANCES:

For the Government:	STEPHEN CARLTON, ESQ.
	HOWARD DARGAN, ESQ.
For the Defendant:	THOMAS PUCCIO, ESQ.
	ROMA THEUS II, ESQ.
Court Reporter:	Richard Greenspan, CSR, RPR, RMR, CRR United States Courthouse West Palm Beach, 33401

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(10:45 a.m., jury not present)

MR. DARGAN: Judge, just in an abundance of caution, MR. CARLTON and I went back to members of our office and discussed the situation that Mr. Puccio raised, discussed it as well with some of the people in the Appellate Division, and I think the consensus from our office is that it would be prudent if your Honor made an inquiry of the alternate, to have her come in to lock in, if you will, what exactly was the extrinsic matter that was discussed.

As I understand it, it was strictly stick to your guns, something not prejudicial, but I think it is important that be locked in so six months down the road, 4 months down the road the version of events does not change.

I think if there is other extrinsic matter that was discussed, I think if it is done promptly it would still give your Honor an opportunity to potentially correct the situation and remove any taint that might possibly exist, if we can learn what exactly happened from the alternate juror.

Also it may provide the basis for the United States to argue that the sitting juror should be removed for cause, depending upon what was given to her, but I think it's premature for us to argue that at this point.

I think the important point is if your Honor could make that inquiry, not to get into what the deliberations were that are being discussed by the jury, but just what the

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extrinsic matter is.

THE COURT: The important thing is not what the juror said to the alternate, the important thing is what the alternate said to the juror.

Most of the cases that deal with this, they talk about outside contact with jurors, usually that's when an outsider contacts a juror. In his case the juror contacted an outsider, albeit a former juror or the alternate juror, who heard all the testimony. It's not like a party had approached or an attorney had approached or even a family member had approached where you are trying to influence that juror, and furthermore, it is the juror who made the contact.

The important question is what did the alternate say to the juror and I agree that we probably should make a record of that. If you could bring her in some time, I know I am tied up between 3 and 5 this afternoon with a contested sentencing hearing.

MR. DARGAN: Your Honor, I am not sure that the government even knows where she is or how to contact her. I think it would be appropriate for the court, either through Betty or the marshals, to reach out for her and schedule an appointment and we can all be there.

I think it would be prudent that the attorneys, both sides involved, not contact this juror, so there is no appearance of any impropriety, as well as any parties

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associated with the defendant.

THE COURT: Betty, do you know how to contact that alternate juror?

THE CLERK: Yes, I can. I mean, I can find out the phone number.

THE COURT: Call her and see if we can get her in here before 3:00, before that Morgan hearing.

MR. PUCCIO: Judge, could I just say, I agree -- I mean I consent to the application.

I just wanted to say two things. One, your Honor, is that I wasn't attempting in my conversation to "debrief" this woman. I was more listening to what she had to say, so I really have no idea what else she has to say beyond what I related to the court the other day, so I think a debriefing of some sort is essential.

The second thing I would say is, and I looked at the same cases your Honor is looking at, in fact, in the same book, but I would say your Honor, in addition to the proposition in this circuit, I think it's the Supreme Court ruled that when there is such a contact, there is presumptive prejudice, a rebuttable presumption, of course, so this should be done, but beyond that I believe that perhaps even more compelling here is what I would view, putting together what this woman told me with what was observed outside yesterday, a real case of juror coercion.

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These cases are not often easily documented because of 606, but here we can -- this issue can be reached, perhaps even corrected by the court without intruding on 606. We don't have a verdict yet and we are not getting information from the affected juror, we are getting information from a private citizen who used to be a juror and also people who were eyewitnesses. This woman, Ms. Budd, is obviously being put upon.

THE COURT: Deliberations means give and take. You hear jurors arguing all the time. That's -- you hear lawyers argue. That's the way you get at the truth, by arguing your various impressions.

I don't think we are anywhere near -- the cases on juror coercion, I don't think I have ever seen one, but this is a normal thing that goes on in the jury room, that they argue their position. That's normal. I am not concerned with that at this point.

MR. PUCCIO: I was saying the reason you don't see them is the rule that doesn't allow jurors to impeach their verdict, but here we have a unique situation, you have a party who knows about the coercion who can be interrogated.

THE COURT: I will not ask what the juror said, only what she said to the juror.

MR. DARGAN: That's appropriate and consistent with the case law.

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MR. PUCCIO: I can make my objection later, but I think it's important to find out if there is coercion going on, and if there is, your Honor should take corrective action.

MR. CARLTON: That's creating error, that's what that's doing.

THE COURT: I will inquire into what she is communicating to the juror. I imagine there are numerous cases with which jurors disregard the court's instructions and go home and discuss it with their family and friends. We will never know how often that happens. At least it isn't, you are not dealing with aninappropriate contact by a party, an attorney or a friend of a party to solicit a vote or to convince somebody, but I suspect that very often jurors disregard the court's instruction and discuss it with their family. They shouldn't do that, but we will never know.

MR. PUCCIO: In this case we would know because we have a witness.

MR. CARLTON: You can't do that.

THE COURT: Okay, we will see if we can contact her.

(Recess at 10:55 a.m.)

(2:00 p.m., in the courtroom)

(Alternate Bonnie Huffman present)

THE COURT: The reason we are doing this is because we are required whenever there has been a contact with a juror,

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that we determine the nature of the contact and make sure nothing inappropriate occurred, so we just want to make a record of that.

Just relax and we are just going to ask you a few questions. I think just to be on the safe side I should have you sworn. So if you will swear her.

BONNI HUFFMAN, ALTERNATE JUROR, SWORN.

THE COURT: I believe it was yesterday defense counsel, MR. PUCCIO, said that he had talked to you on the phone and that you had reported that one of the jurors had called you on the phone. Is that correct?

MS. HUFFMAN: Yes.

THE COURT: What was that juror's name.

MS. HUFFMAN: Marilyn.

THE COURT: I am not interested in what she said to you, but I am interested in what you said to her. That may somehow involve what she said to you, but first of all, according to a newspaper account, you indicated to the lawyers or the newspaper afterward that you were somewhat favorable to the defendant's position; is that correct?

MS. HUFFMAN: That's true.

THE COURT: Could you just kind of summarize what you said -- did she call you once or twice?

MS. HUFFMAN: Once, and then I called her back because she lived in Delray and I didn't want her --

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THE COURT But it was all on the same occasion, it wasn't on two different times?

MS. HUFFMAN: Yes. Well, she has been calling me regularly inquiring about my mother. She was ill.

THE COURT: I am only concerned about conversations you had after you left.

MS. HUFFMAN: Okay, twice.

THE COURT: Twice, okay.

She called you both times?

MS. HUFFMAN: No.

THE COURT: You called her one time?

MS. HUFFMAN: Yes.

THE COURT: On the first occasion basically what did you say to her?

MS. HUFFMAN: I just -- she seemed upset because of how it was going and I told her that she needed to stand by what she believed in.

THE COURT: Okay. Apparently she called you because she was favorable to the defendant's position and she felt that you would be sympathetic to that; is that correct?

MS. HUFFMAN: She had told me that one thing, and I really truly don't remember what it was, one thing that she had believed was to be the truth, that she felt different about, but the rest of it she didn't.

THE COURT: I'm not so much concerned about what she

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said to you, but more concerned about what you said to her. You just said stand by, stick to your guns, in other words?

MS. HUFFMAN: Yes, stick by what you believe in because don't -- because they are raising their voices at you and saying things like that, that you can't -- I don't feel that's being truthful if you allow someone to intimidate you to go the other way. That's pretty much what I said.

THE COURT: That was the first conversation, right?

MS. HUFFMAN: Yes.

THE COURT: Now, the second conversation when you called her, what did you say to her?

MS. HUFFMAN: I will have to sit and think about it. I'm so sorry. I really don't remember.

THE COURT: Generally along the same lines?

MS. HUFFMAN: Yes. It was about the trial.

THE COURT: Did any of you feel that it was improper for you to be talking since you were no longer on the jury?

MS. HUFFMAN: No, sir.

THE COURT: You know that I instructed the jury not to talk to anyone -- of course, maybe she felt you were on the jury and that you were excluded, but of course you were off the jury at this time.

Would it be fair to summarize that you favored the defendant's position, she favored the defendant's position at the time that you were talking and you urged her to stand by

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her guns and not to give in to pressure in effect?

MS. HUFFMAN: Right. And I truly don't believe she knew how I felt, what my opinion was.

THE COURT: She might have read it in the paper if it was in the paper, since somebody told me it was.

All right, any other areas that counsel think we ought to go into?

MR. DARGAN: Just if that was the only communication, that was the only conversation that she had along those lines, the government is satisfied.

MR. PUCCIO: Your Honor, may I have a side bar on this?

THE COURT: Certainly.

(At the side bar)

MR. PUCCIO: The reason I asked for a side bar is I don't want to be putting words in anyone's mouth, but I would discuss it with the court first.

I believe that it's appropriate to conduct an inquiry as to what this juror was saying to her, because as I said before --

THE COURT: Was saying?

MR. PUCCIO: To this person because we believe that the tremendous amount of pressure, beyond what is proper, was put on the juror that called her, that caused her to call her.

When she spoke to me, when this witness, the former

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juror spoke to me, she indicated the woman called her and was hysterical and was up all night, et cetera, et cetera, et cetera. I think with we need a full record on that.

I think also a record should be developed on what occurred prior to deliberations that this woman knows about, the selection of a foreperson without authorization of the court, which apparently took place weeks before the deliberations, the fact that she indicated to me, this woman indicated to me that Mr. Levy and others, but certainly Mr. Levy, had made up his mind about my client's guilt, before the evidence even practically started, and had made it known.

I would also think the amount of misconduct that I would suggest has occurred, she should be asked about whether any of the jurors had access to information within the jury room that they shouldn't have, such as newspaper articles or other information about the background of the case, anything else that's not within the rules that they should have.

THE COURT: Okay, I am not going to allow any interrogation along those lines. That goes into the prohibited areas of jury deliberations. The only thing I am concerned about is any extraneous information going into the jury room and from the defendant's standpoint they certainly have no complaint because apparently she was urging her to stand by her position.

I will release her at this time. I don't intend to

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ask any further questions.

MR. PUCCIO: I was not -- in addition to asking her about what the juror said to her, I was talking about information about what occurred prior to the deliberations.

THE COURT: No, I am not going to go into that.

(In the courtroom)

THE COURT: Those are the only questions we have. You are free to go. Thank you.

Court will be in recess.

(Jury present)

THE COURT: Has the jury arrived at a verdict?

THE FOREMAN: Yes, we have.

THE COURT: If you will hand the verdict form to the clerk, please.

You may publish the verdict.

THE CLERK: United States District Court, Southern District of Florida, United States of America v. Arnold Paul Prosperi, case number 96-8086-Criminal-Ryskamp.

We, the jury, find the defendant Arnold Paul Prosperi:

As to count 3: Guilty.
As to count 4: Guilty.
As to count 5: Guilty.
As to count 14: Guilty.
As to count 15: Guilty.

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Thomas Higgins, foreperson, November 6, 1997.

THE COURT: Members of the jury, I am going to ask the clerk to poll you; that is, she will call your name and ask you if that's your verdict and you will respond accordingly.

THE CLERK: Norma Bacharach, is the verdict as read your verdict?

JUROR: Yes.

THE CLERK: Charles Scott, is the verdict as read your verdict?

JUROR: Yes.

THE CLERK: Jean Sarazen, is the verdict as read your verdict?

JUROR: Yes.

THE CLERK: Thomas Higgins, is the verdict as read your verdict?

JUROR: Yes.

THE CLERK: Donald Hotaling, is the verdict as read your verdict?

JUROR: Yes.

THE CLERK: Morris Levy, is the verdict as read your verdict?

JUROR: Yes.

THE CLERK: Clovis Lane, is the verdict as read your verdict?

JUROR: Yes.

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THE CLERK: Madeline Hanney, is the verdict as read your verdict?

JUROR: Yes.

THE CLERK: George Linnartz, is the verdict as read your verdict?

JUROR: Yes.

THE CLERK: Penelope Enfield, is the verdict as read your verdict?

JUROR: Yes.

THE CLERK: Marilyn Budd, is the verdict as read your verdict?

JUROR: Yes.

THE CLERK: Hope Fearnley, is the verdict as read your verdict?

JUROR: Yes.

THE COURT: Members of the jury, I would like to thank you for your service. This case is longer than most that we take. I know it was a considerable inconvenience to you for the time that you spent on this case. I'm sure you have learned a good bit about the criminal justice system and how the courts work. You are now discharged from any further obligations in this case.

Once again, thank you and you are discharged.

(Jury excused)

Supreme Court, U.S.
FILED
SEP 22 2000
CLERK

No. 99-2078

In the Supreme Court of the United States

ARNOLD PAUL PROSPERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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29pp

QUESTIONS PRESENTED

1. Whether Federal Rule of Evidence 606(b) prevents a district court from inquiring into allegations of juror misconduct before the jury reaches a verdict.

2. Whether the district court unconstitutionally coerced the jury to return a verdict of guilty when, after having already instructed the jurors not to surrender their conscientiously held beliefs, the court asked the jury to "continue to deliberate."

3. Whether the statutory definition of "counterfeited" under 18 U.S.C. 513 includes a "similitude" requirement or instead merely requires that the document "purport[] to be genuine."

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In the Supreme Court of the United States

No. 99-2078

ARNOLD PAUL PROSPERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 201 F.3d 1335. The opinion of the district court (Pet. App. 24a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2000. A petition for rehearing was denied on March 30, 2000 (Pet. App. 43a). The petition for a writ of certiorari was filed on June 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted following a jury trial in the United States District Court for the Southern District of Florida on two counts of filing false tax returns, in violation of 26 U.S.C. 7206(1), and three counts of uttering counterfeit securities, in violation of 18 U.S.C. 513(a). The district court granted petitioner's post-verdict motion for a judgment of acquittal on the counterfeiting counts, and sentenced petitioner to 36 months of imprisonment and one year of supervised release on the tax counts. The court of appeals affirmed petitioner's tax convictions, but reversed the judgment of acquittal with respect to petitioner's counterfeiting convictions.

1. In 1979, petitioner, an attorney, began representing Patrick Donovan, an elderly Irish investor, in connection with Donovan's investments in the United States. In 1987, petitioner began embezzling large sums of money from Donovan. In particular, petitioner diverted to his own use proceeds from the sale of a golf course held by Donovan's offshore corporation, Amaretto. Petitioner then presented Donovan with fake "certificates of deposit" (CDs) and alleged correspondence from Citibank Corporation and J.P. Morgan purporting to show that the proceeds had been reinvested in those instruments. Gov't C.A. Br. 5-6.

In 1992, the Internal Revenue Service (IRS) began investigating the golf course sale because no tax return had been filed for the proceeds. When the IRS contacted petitioner as Amaretto's agent, petitioner claimed that no taxes were due. The IRS, however, discovered bank records showing that a substantial portion of the proceeds went directly to petitioner. Petitioner then claimed that Donovan's corporation had

loaned him the funds. He refused to provide the IRS with requested documents and information, and refused to identify Amaretto's beneficial owner. Gov't C.A. Br. 10-11. When the IRS notified Donovan that the golf course proceeds had gone to petitioner, Donovan filed a lawsuit against petitioner and began cooperating with the IRS, turning over the fake CDs and other documents petitioner had given him. *Id.* at 11-13.

Petitioner was convicted of three counts of uttering counterfeit securities, based on the fake CDs, in violation of 18 U.S.C. 513, and two counts of filing false tax returns, based on his failure to pay taxes on the diverted golf course proceeds, in violation of 26 U.S.C. 7206(1). At petitioner's trial, the government called numerous witnesses to testify about petitioner's embezzling activities. Petitioner's employees, for example, testified to having seen petitioner falsifying documents. The government also called representatives of Citibank and J.P. Morgan, who testified about the appearance of genuine certificates of deposit and identified features of the fake CDs that made them look like genuine certificates. Gov't C.A. Br. 14. Petitioner took the stand in his own defense and claimed that Donovan had approved his removal of monies from Donovan's investment portfolio, and that Donovan himself had forged the fake CDs. *Id.* at 15-16.[1]

2. On November 3, 1997, the district court submitted the case to the jury. At that time, the one remaining alternate was excused.

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[1] Based on petitioner's testimony at trial, the district court increased his sentence for obstruction of justice. Gov't C.A. Br. 16 & n.1.

a. On November 5, after the jury had deliberated for one full day, petitioner's counsel informed the court that he had twice contacted the excused alternate. Counsel said that the alternate believed that one of the sitting jurors had "made up his mind from day one and * * * sort of palled around with" another juror, whom the alternate suspected was "of similar mind." Counsel also stated that the excused alternate thought the pro-government juror had somehow "engineered the selection of a foreperson." Pet. App. 49a. Counsel then informed the court that between his first and second conversations with the excused alternate, the alternate had spoken with one of the sitting jurors, Ms. Budd. According to counsel, the alternate reported that Ms. Budd was pro-defense and was "being pummeled into submission" by a jury that was divided 10 to 2 in favor of conviction. *Id.* at 50a.

Petitioner's counsel moved for removal of the jurors whom the alternate suspected of favoring the government, and for an investigation of the sitting jury; counsel declined to consent, however, to trial before a jury of less than twelve if his motions were granted. The court admonished petitioner's counsel, stating that it had not "intend[ed] that you continue to talk with [the alternate] * * * [about] anything going on in the jury room," and noted that the alternate may have given "improper" advice to the sitting juror. The court also referenced Federal Rule of Evidence 606(b), which renders juror testimony about intrinsic influences on deliberations inadmissible to impeach the verdict.[2]

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[2] Rule 606(b) states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring

Although petitioner argued that the Rule did not apply where the jury had not yet rendered its decision, the court denied petitioner's motion for a mistrial. Pet. App. 50a-54a. Instead, the court sent a cautionary note to the jury, instructing the jurors not to discuss the case with anyone else or while outside the jury room. *Id.* at 54a-55a.

Later that afternoon, petitioner's counsel again approached the court. He stated that two unidentified persons had observed Ms. Budd engaged in "animated heated discussion" with the juror whom the alternate had accused of partiality. Counsel again moved for an evidentiary hearing and a mistrial, and the court again denied the motions. The court observed that the substance of the "animated" discussion was unknown, and stated that Rule 606(b) would prevent the court from taking a juror's statement about intrinsic influences. Pet. App. 65a-69a.

b. Later that same day, the jury sent the court a note.[3] The court informed the parties that the jury had

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during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b).

[3] The jury had been deliberating for less than two days. See 34 Tr. 4791 (jury released at 4:20 p.m. on November 3, to be

a verdict on the counterfeiting counts but was "hung up on [the tax counts] and they say there is no change in the near future." Pet. App. 64a-65a. The court concluded that the situation did not warrant resort to an *Allen* charge, see *Allen* v. *United States*, 164 U.S. 492 (1896), and instructed the jury to "continue to deliberate" on the tax counts. Pet. App. 65a. Petitioner's counsel moved for a mistrial, and the court denied the motion; at that point, the court again recessed. *Ibid.*

The next morning, the court interviewed (in open court, under oath) the alternate with whom petitioner's counsel had spoken. Pet. App. 75a-81a. The alternate admitted that she and Ms. Budd had exchanged phone calls during the jury's deliberations. She stated, however, that the gist of the calls was that Ms. Budd was upset, and that she (the alternate) simply told Ms. Budd to "stand by what she believed in." *Id.* at 77a-78a. Petitioner's counsel moved for further interrogation of the alternate about the sitting jurors' opinions of the case before deliberations, and their access to newspaper articles and other materials during trial. The court denied the motions, stating that "[t]hat goes into the prohibited areas of jury deliberations. The only thing I am concerned about is any extraneous information going into the jury room [from the alternate] and from the defendant's standpoint they certainly have no complaint because apparently she was urging her to stand by her position." *Id.* at 75a-80a.

That afternoon, the jury returned a verdict of guilty on all counts. The court polled the jury and all jurors confirmed the verdict. Pet. App. 81a-83a.

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dismissed for the day at 4:30 p.m.) and Pet. App. 64a (court informed counsel of jury note at 3:00 p.m. on November 5).

c. Following the jury's verdict, the district court first denied but then on reconsideration granted petitioner's motion under Fed. R. Crim. P. 29(b) for a judgment of acquittal on the counterfeiting counts. Pet. App. 24a-42a. The district court concluded that, although 18 U.S.C. 513(c) contains a definition of the word "counterfeited," the statute also incorporates the common-law definition, which requires "similitude" between the allegedly counterfeit security and the genuine article. Pet. App. 27a-28a. Examining the evidence in this case, the court concluded that it could not say, as a matter of law, that similitude was lacking. *Id.* at 37a. But it concluded that, because the government had not introduced a genuine CD to which the jury could compare the fake ones, the government had not produced sufficient evidence of similitude. *Id.* at 37a-40a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-23a. First, the court of appeals upheld the district court's decision not to conduct further investigation of the sitting jury, holding that "[e]ven if the district court underestimated the scope of its discretion under Rule 606(b), the court's ultimate decision not to investigate allegations of misconduct that were entirely endemic to the deliberations was not an abuse of its discretion." *Id.* at 7a. Second, the court upheld, as non-coercive, the district court's instruction that the jury "continue to deliberate" in an effort to reach a verdict on all counts. *Id.* at 7a-8a.

The court of appeals reversed the judgment of acquittal on the counterfeiting counts, concluding that Section 513 does not contain a "similitude" requirement. Pet. App. 9a-22a. Beginning with the language of the statute, the court of appeals explained that Section 513 defines "counterfeited" without reference to "simili-

tude"; instead, Section 513(c) defines documents as counterfeit if they purport to be genuine, when in fact they are not. *Id.* at 9a. That construction, moreover, was consistent with Congress's purpose of addressing "the increasing production of counterfeited documents that are not as generally recognizable as currency, such as CDs," because citizens who do not know what CDs look like would not be protected by a statute that addresses only documents that in fact resemble genuine CDs. *Id.* at 9a-10a. The court found further support for its construction in the Sentencing Guidelines, which define "counterfeited" in the same terms. *Id.* at 14a.

ARGUMENT

1. Petitioner first contends (Pet. 11-18) that the courts of appeals are divided on the proper scope of Federal Rule of Evidence 606(b), which addresses the extent to which, "[u]pon an inquiry into the validity of a verdict or indictment," a juror may "testify as to any matter or statement occurring during the course of the jury's deliberations." Fed. R. Evid. 606(b). Under Rule 606(b), a juror may not testify about the jury's deliberations during such an inquiry unless the inquiry concerns "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." *Ibid.* In this case, petitioner argues, the court of appeals improperly applied Rule 606(b) to preclude a pre-verdict inquiry into juror misconduct, even though Rule 606(b) by its terms addresses juror testimony only in "an inquiry into the validity of a verdict." See Pet. 11.

a. As an initial matter, that issue is not properly presented by this case, because the court of appeals did not address the scope of Rule 606(b). To the contrary,

the court of appeals declined to reach the district court's construction of that rule, making it clear that, "*[e]ven if the district court underestimated the scope of its discretion under Rule 606(b)*, the court's ultimate decision not to investigate allegations * * * that were entirely endemic to the deliberations *was not an abuse of its discretion*." Pet. App. 7a (emphasis added); *ibid.* (decision was "within its discretion"). Thus, contrary to petitioner's assertions, the court of appeals did not uphold "the district court's conclusion that it *lacked* discretion under Rule 606(b) to conduct a pre-verdict hearing on the allegations of 'internal' juror misconduct." Pet. 11, 15 (emphasis added). Instead, the court of appeals merely concluded that, under the facts of this case, the district court did not abuse the discretion it had. In that respect, the court's holding resembles that of the court in *United States* v. *Sababu*, 891 F.2d 1308 (7th Cir. 1989), which petitioner cites (Pet. 14) as conflicting with the decision below. In *Sababu*, the Seventh Circuit found harmless the district court's statement that "he was barred from questioning the jury by [Rule 606(b)]," because "[t]he court had other valid reasons for refusing to question the jury." 891 F.2d at 1333, 1335.[4]

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[4] The court of appeals did not express the view "that a district court *ordinarily would err* if it elects to investigate any pre-verdict allegation of improper 'internal' influences," Pet. 12 (some emphasis added). The court of appeals merely stated that such an investigation "*may* have *invited* reversible error." Pet. App. 7a (emphasis added). The observation that error *might occur* if an investigation were conducted is not the same as a holding that the investigation itself would have been reversible error. It simply acknowledges that intrusion into the jury by investigation may inadvertently prejudice its deliberations. See, *e.g.*, *Sababu*, 891

That understanding of the decision in this case, moreover, comports with earlier Eleventh Circuit decisions, which recognize that trial courts *do* have discretion to interview jurors about intrinsic influences on their deliberations before verdict, notwithstanding Rule 606(b). See *United States* v. *Yonn*, 702 F.2d 1341, 1345 (11th Cir.) (recognizing the "wide latitude afforded the trial judge" in conducting a pre-verdict investigation of jury misconduct), cert. denied, 464 U.S. 917 (1983); *United States* v. *Gabay*, 923 F.2d 1536, 1541-1542 (11th Cir. 1991) (upholding pre-verdict voir dire of jurors, conducted under "the procedures outlined in *United States* v. *Yonn*," in response to allegations of premature deliberation); *United States* v. *Heller*, 785 F.2d 1524, 1525-1526 (11th Cir. 1986) (reversing conviction based on jurors' pre-verdict testimony as to allegation of racial slurs during deliberations); cf. *United States* v. *Hernandez*, 921 F.2d 1569, 1577 (11th Cir.) (upholding, without reference to Rule 606(b), the district court's decision not to investigate allegations of jurors sleeping during trial), cert. denied, 500 U.S. 958 (1991). The decision in this case does not purport to overrule that line of cases.[5] It merely finds no abuse of discretion on these facts.

The court of appeals' recognition of the distinction between "extrinsic" and "intrinsic" influences on the jury does not compel the conclusion that the court incorporated Rule 606(b) into the pre-verdict context.

F.2d at 1334 (noting that investigation could cause jurors to attach undue importance to an issue or incident).

[5] Any claim of intra-circuit conflict is, in any event, for the court of appeals to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

See Pet. 12. As this Court has explained, alleged extrinsic influences on the jurors implicate the defendant's right to be tried exclusively on evidence admitted at trial. *Turner* v. *Louisiana*, 379 U.S. 466, 472 (1965). See also *Remmer* v. *United States*, 347 U.S. 227 (1954). Because of that, a court has less discretion not to conduct an investigation where there is a sufficiently colorable showing of "extrinsic" influence. *United States* v. *Rowe*, 906 F.2d 654, 656 (11th Cir. 1990); *United States* v. *Davis*, 15 F.3d 1393, 1412 (7th Cir.), cert. denied, 513 U.S. 896 (1994). In contrast, where the alleged influence is "intrinsic," the policy of preserving jury secrecy and independence, as well as the need to avoid the risk of influencing the jury through the investigation itself, weighs against an inquiry. As a result, in the pre-verdict context, district courts have correspondingly greater discretion to decline to conduct an investigation of intrinsic influences than they do with respect to extrinsic influences. See, *e.g.*, *United States* v. *Hanley*, 190 F.3d 1017, 1031 (9th Cir. 1999); *United States* v. *Chiantese*, 582 F.2d 974, 978 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979). See also *Grooms* v. *Wainwright*, 610 F.2d 344, 347 (5th Cir.), cert. denied, 445 U.S. 953 (1980). Indeed, one of the principal cases petitioner relies on, *United States* v. *Resko*, 3 F.3d 684 (3d Cir. 1993), cited Pet. 12-13, makes precisely that point. See 3 F.3d at 690 (distinguishing between intrinsic and extrinsic influences in the pre-verdict context; concluding that, because intra-jury influences do not create "reason to doubt that the jury based its ultimate decision only on evidence formally presented at trial," trial courts

exercise comparably broader discretion when deciding not to investigate claims alleging "only improper *intra*-jury influence").[6] In light of that recognized dichotomy, the court of appeals' mention of the distinction between intrinsic and extrinsic influences in Rule 606(b) does not mean that it applied all of the strictures of that rule (*e.g.*, its bar on interviewing jurors on intrinsic influences) to claims of misconduct that arise before verdict. If it had, the opinion's discussion of the district court's discretion to hold a hearing (or not) would have been beside the point.

b. Petitioner also asserts that the Third, Fifth, and Seventh Circuits permit pre-verdict inquiries into intrinsic influences based on the view that Rule 606(b) is inapplicable until after verdict, while "in the Sixth, Tenth, and * * * Eleventh Circuits, the district court would find itself without *any* authority to interrogate jurors about the scope of the misconduct and its prejudicial effect." Pet. 15. No such conflict exists. As indicated above, the Eleventh Circuit itself allows pre-verdict inquiries, including inquiries into internal influences, under appropriate circumstances. See p. 10, *supra*; see, *e.g.*, *Gabay*, 923 F.2d at 1541-1542. The same is true in the Sixth and Tenth Circuits.

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[6] Although the court of appeals in *Resko* repeatedly recognized the "broad" discretion exercised by district courts with respect to internal influence claims, 3 F.3d at 690, it concluded that, on the facts of that case, the district court had abused its discretion. In particular, it concluded that, because the alleged misconduct was so widespread—"every juror admitted to partaking in premature discussions"—the trial court was required to conduct a hearing. *Ibid.* Petitioner does not allege comparably widespread disregard of the court's instructions here.

Petitioner cites *United States* v. *Herndon*, 156 F.3d 629 (6th Cir. 1998), as barring pre-verdict inquiries into internal influences. Pet. 14-15. In that case, however, the court of appeals held that the district court abused its discretion by *failing* to investigate the defendant's pre-verdict allegations of improper influence. The court did not hold that Rule 606(b) *bars* pre-verdict inquiries into instances of internal misconduct. Nor does *Herndon* state that Rule 606(b) governs such inquiries. Petitioner notes (Pet. 15) that *Herndon* quotes Rule 606(b) at the beginning of its discussion and discusses the difference between extrinsic and intrinsic influences on the jury. But the court of appeals' reliance on the distinction between intrinsic and extrinsic influences was proper whether or not Rule 606(b) applies, since a district court has *less* discretion to *refuse* to investigate claims of improper extrinsic influences than it does with respect to intrinsic influence claims. See pp. 10-12, *supra*.

Petitioner's reliance (Pet. 15) on *United States* v. *Davis*, 1 F.3d 1014 (10th Cir. 1993), is likewise misplaced. In that case, the district court *did* conduct pre-verdict voir dire and an evidentiary hearing on jury bias, 1 F.3d at 1016, and the Tenth Circuit approved that practice, *id.* at 1016-1017. In so doing, the Tenth Circuit mentioned Rule 606(b), stating that "[i]nquiry into such matters, within the limitations of Fed. R. Evid. 606(b)," is "appropriate." Pet. 15 (quoting 1 F.3d at 1016) (emphasis omitted). But the court did not say (let alone hold) that Rule 606(b) applies to inquiries conducted before verdict or renders any type of pre-verdict inquiry per se improper. And in the later decision of *United States* v. *McVeigh*, 153 F.3d 1166, 1186-1188 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999), the court recognized—without making any ref-

erence to Rule 606(b)—that district courts have discretion to hold hearings on claims of premature juror deliberations (*i.e.*, intrinsic misconduct). The court in fact stated that "holding a hearing would have been preferable" in the circumstances of that case, although it held that the district court had not abused its discretion in declining to do so. *Id.* at 1188.

c. Petitioner, in any event, cannot show that the district court abused its discretion in this case. Petitioner admits (Pet. 11) that he alleged only intrinsic influences on the jury, *i.e.*, premature deliberations and deliberative pressure brought by jurors against one another. The only evidence he presented to show premature deliberations, moreover, was defense counsel's report that the excused alternate thought a juror "had made up his mind from day one." Pet. App. 49a. In light of the vague and speculative nature of that claim, as well as its source—hearsay through defense counsel—the court was within its discretion to deny counsel's motion for further inquiry or mistrial.

Nor was there reason to investigate the deliberative pressure that jurors brought against each other. Petitioner cites no case, and we have found none, in which a court declared a mistrial based on internal deliberative pressure. See *Thompson* v. *Cain*, 161 F.3d 802, 810 (5th Cir. 1998) (distinguishing between deliberative pressure from court and deliberative pressure from other jurors, noting that the latter "does not raise the specter of a constitutional violation"). As the district court observed, it is common that deliberations become heated and confrontational when another person's life or liberty is at stake. Pet. App. 74a. Thus, the district court was also within its discretion when it decided not to investigate the jury's internal dynamics.

2. Petitioner next contends (Pet. 18) that the district court unconstitutionally coerced a guilty verdict by asking the jury to "continue to deliberate," without reiterating its earlier admonition that the jurors should not abandon their "honest beliefs" solely to reach a verdict. That contention is without merit, and does not in any event warrant review.

a. Following *Allen* v. *United States*, 164 U.S. 492 (1896), this Court has stated that a supplemental charge encouraging a deadlocked jury to continue deliberations must be examined "in its context and under all the circumstances" of the case. *Jenkins* v. *United States*, 380 U.S. 445, 446 (1965); *Lowenfield* v. *Phelps*, 484 U.S. 231, 237, 241 (1988). So long as the district court refrains from inquiring regarding the numerical division of the jury, see *Brasfield* v. *United States*, 272 U.S. 448, 449-450 (1926) (announcing per se rule preventing such inquiry), an instruction that encourages further deliberation may be upheld. The inquiry into coercion is thus necessarily fact-intensive.

Applying that totality test, courts evaluating requests merely to "continue deliberations" have often found no constitutional violation. See, *e.g.*, *Young* v. *Herring*, 938 F.2d 543, 556-559 (5th Cir. 1991) (upholding instruction to "continue your deliberations"), cert. denied, 503 U.S. 940 (1992); *United States* v. *Black*, 843 F.2d 1456, 1463 (D.C. Cir. 1988) (instruction urging continued deliberations, even after partial verdict instruction and two notes from jury, was "an entirely proper and non-coercive request"). See also Pet. 23 (collecting comparable cases). The totality of the circumstances in this case supports the court of appeals' decision to reach the same result here. As the court of appeals noted, the district court's request was "routine and neutral. Nothing in the brief [supplemental] instruction sug-

gested that a particular outcome was either desired or required." Pet. App. 8a. The request to "continue to deliberate," moreover, did not "speak specifically to the minority jurors"; indeed, the trial court did not, at the time it gave the instruction, know the nature of the division among the jurors, *ibid.*, and the jurors had no reason to believe the court of appeals would know. Contrast *Lowenfield*, 484 U.S. at 237 (instructions that speak directly to the minority are inherently more coercive).[7] In addition, the jurors themselves had not indicated an insurmountable impasse, but rather an inability to reach a decision in the "near" future; thus, the jurors would be less likely to interpret the further instruction to deliberate as a request for unanimity at all costs. Finally, the jury had been deliberating for only 15 hours, compare *United States* v. *Coffman*, 94 F.3d 330, 336 (7th Cir. 1996) (upholding court's instruction to "keep deliberating" when jury had indicated

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[7] Petitioner implies (Pet. 7) that, because the alternate informed petitioner's counsel that she knew the jury's composition (10-2 in favor of conviction) at the beginning of deliberations, the court's instruction to "continue to deliberate" was directed toward the 2 jurors in favor of acquittal. The court's knowledge of the jury's composition, however, is irrelevant to the coercion inquiry; it is the jury's *awareness* of that knowledge that may render further instruction coercive. A minority juror who knows that the court is aware of his position in the minority may interpret any instruction to "achieve unanimity" or to "re-examine your views" as directed to him alone. But petitioner does not suggest that any minority jurors knew that Ms. Budd had spoken to the alternate, or that she had advised the alternate of the initial numerical division, much less that the judge had been advised of the division. And in any event, as the court of appeals noted (Pet. App. 8a), the district court here was "unaware of the composition of the jury's nascent verdict" at the time it gave the instruction.

disagreement after only ten hours of deliberation), cert. denied, 520 U.S. 1165 (1997), and after the court's instruction, it continued to deliberate for more than a day before reaching its decision. Compare *Lowenfield*, 484 U.S. at 240 (verdict returned 30 minutes after supplemental instruction might "suggest[] the possibility of coercion"), with *United States* v. *Estacio*, 64 F.3d 477, 482 (9th Cir. 1995) (verdict returned 75 minutes after court asked jurors to return later and inform the court of "where you are" so the court could make an appointment did not "give rise to any presumption of coercion"), cert. denied, 517 U.S. 1121 (1996).

b. Petitioner claims (Pet. 18-19) that the decision below conflicts with decisions of the "vast majority" of courts because the district court's charge contained no "cautionary language" reminding dissenting jurors not to surrender their conscientiously held beliefs. The district court, however, had once before instructed the jury "not [to] give up your honest beliefs solely because the others think differently or merely to get the case over with."[8] Jurors are presumed to follow their instructions, *Francis* v. *Franklin*, 471 U.S. 307, 324 n.9 (1985), and there is no reason to believe that they did

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[8] Before the jury retired to deliberate, the court instructed:

> It is your duty as jurors to discuss the case with one another in an effort to reach agreement, if you can do so. Each of you must decide the case for yourself * * *.
>
> While you are discussing the case, do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong, but do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

34 Tr. 4787-4788.

not do so here. Moreover, the cautionary language petitioner demands is curative in nature, *i.e.*, designed to eliminate circumstances that otherwise might be coercive. See *United States* v. *Mason*, 658 F.2d 1263, 1268 (9th Cir. 1981) (language is "ameliorat[ive]"); *United States* v. *Rogers*, 289 F.2d 433, 435 (4th Cir. 1961) (if *Allen* charge itself were "stripped of its complementary reminder," then it "might readily be construed by the minority of jurors as coercive"). Such an instruction thus is not required unless the trial court does something that, under the circumstances, would otherwise be coercive.

For those reasons, the decisions petitioner cites as conflicting with the decision below, Pet. 20-23, are all distinguishable. In *Smalls* v. *Batista*, 191 F.3d 272 (2d Cir. 1999), on which petitioner places primary reliance (Pet. 20-21), the jury informed the district court that "[t]he decision is 11 to 1, and we are unable to come to a conclusion." 191 F.3d at 275. The *Smalls* court then gave an instruction that "thrice" directed the jurors to try and "convince the others," asked the jurors to be "open to reason," and specifically indicated that jurors "should make every effort to convince the others whether it be one of eleven, two out of twelve, whatever number it may be." *Id.* at 275, 280. Thus, contrary to petitioner's claim (Pet. 20), the *Smalls* court did not merely direct the jury to "continue to discuss the case" or to "continue a free discussion," and the circumstances were hardly analogous to those here. Instead, because the jury knew that the judge was aware of the nature of the division, the minority juror would naturally have understood the instruction as singling him or her out to be "open to reason," and as reminding the majority of its "responsibility" to change the minority juror's mind. 191 F.3d at 280. Indeed, the

charge specifically directed the majority to "convince the others whether it be one of eleven, two out of twelve, whatever number it may be." *Id.* at 275. Moreover, the Second Circuit expressly declined to "decide whether the charge would have been coercive if it had included the requisite cautionary language." *Id.* at 280. Here, in contrast, the jury had no reason to believe the court was aware of the nature of its division, and the trial court made no reference to jurors convincing each other or changing their minds. And in this case, the trial court had earlier instructed jurors "not [to] give up your honest beliefs solely because the others think differently or merely to get the case over with." There is no indication that a similar instruction was given in *Smalls*.

In any event, both before and after its decision in *Smalls*, the Second Circuit has approved instructions to "continue deliberating," without additional ameliorative language. See *United States* v. *Wallace*, 213 F.3d 627 (2d Cir. 2000) (No. 99-1657) (unpublished) (citing *Smalls* and concluding that "although the supplemental instruction * * * did not caution the jurors not to abandon their individual conscientious views simply to achieve unanimity, we cannot see that it tended to coerce jurors to abandon any conscientiously held doubt"); *United States* v. *Fermin*, 32 F.3d 674, 679-680 (2d Cir. 1994) (approving district court's decision to "refrain[] from giving an *Allen* charge, * * * and simply inform[] the jury to continue to deliberate in accordance with prior instructions" without cautionary language (internal citation omitted)), cert. denied, 513 U.S. 1170 (1995); cf. *DeGrandis* v. *Fay*, 335 F.2d 173, 174 (2d Cir. 1964) (rejecting claim that requiring jury to continue deliberating "coerced the verdict" when court had instructed the jury to "[c]ontinue to deliberate,"

without adding cautionary language, in response to jury's note that "we cannot make a decision on all counts tonight"). There is little reason to think that the Second Circuit would not reach the same result on these facts as well.

The other cases cited by petitioner are inapposite for similar reasons. In *United States* v. *Mason*, 658 F.2d 1263, 1267 (9th Cir. 1981) (cited Pet. 21), for example, the supplemental charge stressed the expense that retrial would impose, and mentioned that the Supreme Court had approved the charge, giving it "special weight in the minds of the jury." And in *United States* v. *Scott*, 547 F.2d 334, 338 (6th Cir. 1977) (cited Pet. 22), the court stated "this, of course, is a very important case," referred to the scheduling problems that would arise if the case had to be retried, and suggested that the jury might reach verdict "in another 15 minutes, 20 minutes." Finally, in *Rogers*, 289 F.2d at 434-435 & n.2 (cited Pet. 21), the court instructed the jury about its "duty" to agree, and echoed the classic *Allen* language —which specifically asks jurors to reconsider their views—but omitted any ameliorative language.

3. Finally, petitioner challenges (Pet. 26) the trial court's instruction regarding the definition of "counterfeited" under 18 U.S.C. 513(c)(1). Tracking the language of that statute, the district court instructed the jury that a document was "counterfeited" if it "purports to be genuine, but is not, because it has been falsely made or manufactured in its entirety." Gov't C.A. Br. 17. Petitioner claims (Pet. 26) that the instruction was erroneous because it failed to include the common-law requirement of similitude. Petitioner, however, identifies no conflict among the circuits on the definition of "counterfeited" under Section 513; nor does one exist. The court below was the first to decide whether Section

513 incorporated a similitude requirement, and the only other appellate court that has since considered that question reached the same result. See *United States* v. *Akers*, 215 F.3d 1089, 1100 (10th Cir. 2000) (rejecting defendant's argument that fake checks were not "counterfeit" under Section 513 because "they were obviously not authentic" and stating that checks need only "purport[] to be genuine" under the statute). Moreover, as the court of appeals pointed out (Pet. App. 14a), courts interpreting an identical definition of "counterfeited" under the Federal Sentencing Guidelines, see Sentencing Guidelines § 2B5.1, have rejected the argument that that term includes an implicit requirement of similitude. See *United States* v. *Webster*, 108 F.3d 1156, 1157-1158 (9th Cir. 1997); *United States* v. *Lamere*, 980 F.2d 506, 513 (8th Cir. 1992); cf. *United States* v. *Kelly*, 204 F.3d 652, 657 (6th Cir.) (incomplete currency may be "counterfeit" under Guideline 2B5.1), cert. denied, 120 S. Ct. 2732 (2000).

Those decisions are correct. As petitioner (Pet. 26) and the court of appeals (Pet. App. 10a) both point out, courts have imposed a similitude requirement with respect to counterfeiting statutes *other* than Section 513. But unlike Section 513, those "older counterfeiting statutes"—18 U.S.C. 472 through 474—"left their key term undefined." The courts therefore filled the gap by incorporating the common-law definition of counterfeit, which required similitude. Pet. App. 10a (collecting cases). When Congress enacted Section 513, however, it defined "counterfeited" as a document that "purports to be genuine, but is not." The presumption that Congress intends a common-law term to incorporate the common-law meaning applies only in the "absence of contrary direction." *Morisette* v. *United States*, 342 U.S. 246, 263 (1952). Where a statute does provide a

definition that varies from the common law, the statutory definition prevails. See *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 325-326 (1992).

The fact that Congress provided a definition of counterfeited in Section 513, but did not include the term similitude, is particularly significant given that Congress has expressly incorporated a similitude requirement in other counterfeiting provisions. Pet. App. 11a (citing 18 U.S.C. 474, which prohibits the possession, with intent to sell, of "any * * * security made * * * after the similitude of any obligation or other security issued under the authority of the United States"). Furthermore, as the court of appeals also pointed out (Pet. App. 12a-13a), a definition of counterfeited that does not require similitude comports with Congress's intent under Section 513, which was to broaden the reach of the existing counterfeiting statutes. See S. Rep. No. 225, 98th Cong., 1st Sess. 371 (1983). Indeed, a similitude requirement would be entirely out of place in Section 513. Where a counterfeiting statute, like 18 U.S.C. 472 through 474, addresses the counterfeiting of documents, such as currency, that are uniform throughout the nation and easily recognizable by the average person, a similitude requirement makes sense. But Section 513 addresses the counterfeiting of documents that are less common and are often non-uniform. As a result, Congress needed to criminalize as "counterfeited" not only those documents that bear a "similitude" to genuine securities, but also those documents that, because they

purport to be genuine, might trick the many people who have never seen the real thing. See Pet. App. 13a.[9]

Petitioner also claims (Pet. 26) that the statutory definition of "counterfeited" under Section 513 *itself* requires a showing of similitude. He contends that, by using the words "purports to be genuine," Congress meant to require a showing that the counterfeit document is closely akin to a genuine security. Pet. 26. A document may "purport[] to be genuine" on its face, however, without actually simulating the genuine document—especially when, as here, the document is essentially the memorialization of a financial transaction, which may change form from organization to organization. Moreover, as the court of appeals found here, accompanying documents that vouch for the authenticity of the counterfeit securities, as well as the fact that the counterfeit securities were relied upon as real, all helped establish that the counterfeit securities "purport[ed] to be genuine." Pet. App. 15a.[10]

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[9] For example, although securities "of the United States" covered under the older statutes are uniform in appearance throughout the country, the form of securities of a "State or political subdivision thereof or of an organization," which are addressed in Section 513, may vary widely. Congress could not have meant for a counterfeit security that bears a similarity to one organization's genuine security, but is passed off as another's (although it lacks similitude to the second organization's document), to fall outside the statute's reach.

[10] Petitioner also points to a statement, in the legislative history of Section 513, suggesting that the term "counterfeited" requires similitude. Pet. 28. As this Court has repeatedly emphasized, however, when a statute "speaks with clarity to an issue," the inquiry is at an end. See, *e.g.*, *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). See also Pet. App. 12a (rejecting reliance on legislative history because statutory text

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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is clear). For the same reasons, petitioner's reliance on Senator D'Amato's comments on a precursor to 18 U.S.C. 514 (Supp. IV 1998) (Pet. 29-30)—a provision passed a decade after Section 513—is unavailing. Indeed, "the views of a subsequent Congress" —let alone the views of the single Senator upon which petitioner places great reliance—"form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960). Petitioner, in any event, misconstrues Senator D'Amato's comments. Although Senator D'Amato indicated that Section 514 (Supp. IV 1998) would "close a loophole" in existing counterfeit law, that loophole did not arise from a "similitude" requirement in Section 513. It arose because Section 513 requires the counterfeited item to be a "security," which is defined as "note, stock certificate, treasury stock certificate, bond," etc. 18 U.S.C. 513(a) and (c)(3). Because of that, before Section 514 was enacted, a defendant could have argued that Section 513 was inapplicable if the allegedly counterfeited document purported to be a financial instrument that is not a "security" listed in Section 513(c)(3). It was for that reason that the Senator's proposed bill, which (as originally proposed) did not cover "securities," extended the counterfeiting prohibition to all "other financial instruments." 141 Cong. Rec. 18,038 (1995). As enacted, Section 514 covers both "securit[ies]" and "other financial instrument[s]." 18 U.S.C. 514 (Supp. IV 1998).

Supreme Court, U.S.
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No. 99-2078

IN THE

Supreme Court of the United States

ARNOLD PAUL PROSPERI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Eleventh Circuit departed from the decisions of other courts of appeals with respect to three important and recurring questions of federal criminal procedure. Far from remotely suggesting that review of those three questions is unwarranted in this case, the unseemly contortions in which the Government's lengthy brief in opposition ("Opp.") must engage in an attempt to avoid review only highlight the urgent need for this Court's guidance.

I. The Decision Below Exacerbates A Conflict Regarding The Scope Of Fed. R. Evid. 606(b).

Relying exclusively on Fed. R. Evid. 606(b), which prohibits jurors from testifying about their deliberative processes "[u]pon inquiry into the validity of a verdict," the courts below refused to investigate allegations of juror misconduct that came to light *before* the jury rendered a verdict. As demonstrated in the petition (Pet. 12-14), several circuits disagree with that interpretation of Rule 606(b), and hold instead that that rule does not control the court's conduct when allegations of misconduct are brought to the court's attention pre-verdict. The Government's principal response is to deny that the courts below relied on Rule 606(b) in refusing to investigate petitioner's claims. While not lacking in audacity, the Government's arguments are completely preposterous.

1. The Government first contends that the scope of Rule 606(b) "is not properly presented by this case" (Opp. 9) because the Eleventh Circuit merely recognized that the district court had "discretion" to decline to investigate claims of juror misconduct and found "no abuse of discretion on these facts." Opp. 11. That argument rests upon a wholesale mischaracterization of the decisions below.

The district court *repeatedly* invoked Rule 606(b) as a bar to any investigation or inquiry into the many allegations of serious misconduct that were brought to its attention. Pet. App. 53a ("[T]he only way you get that [hearing] is with

illegal testimony under Rule 606(b)"); *id.* at 67a ("The only thing you can even take a statement on is whether there is an outside influence"); *Ibid.* ("The only thing that I can really consider under Rule 606(b) is an outside influence and . . . this doesn't involve outside influences"). Thus, the district court did not merely "reference[]" Rule 606(b), Opp. 4; it predicated its refusal to investigate the claims of juror misconduct entirely upon it.

Like the district court, the court of appeals plainly believed—and *repeatedly* stated—that whatever discretion the district court enjoyed to investigate the claims of juror misconduct was "*discretion under Rule 606(b).*" Pet. App. 7a (emphasis added). After quoting Rule 606(b) *in full* (Pet. App. 6a & n.4), the court began its analysis by reaffirming "the breadth of the district court's discretion *under Rule 606(b)*," Pet. App. 6a (emphasis added), and invoked the distinction between "internal" and "external" influences—a distinction that flows from this Court's Rule 606(b) jurisprudence—as the basis for assessing whether the district court's refusal to conduct an investigation was proper. Indeed, the court expressly relied on *United States v. Norton*, 867 F.2d 1354 (11th Cir. 1989), which upheld a district court's refusal to conduct an investigation into allegations of juror duress brought to light *before* a verdict on the ground that under "*Fed. R. Evid. 606(b)* . . . [t]he alleged harassment or intimidation of one juror by another [is] not . . . competent evidence to impeach [a] guilty verdict." *Id.* at 1366 (emphasis added).

The court of appeals thus began and ended its analysis of the juror misconduct claim with the *explicit* understanding that Rule 606(b) establishes the framework under which such claims must be analyzed. Under *no* plausible reading of the opinion can the Eleventh Circuit be said to have held that the district court properly declined to investigate the allegations of juror misconduct in the exercise of some general "discretion" that is somehow independent of that Rule. Because the court of appeals affirmatively *endorsed* the

district court's conclusion that it lacked authority to conduct an investigation under Rule 606(b), the scope of that Rule is properly presented by the petition.

2. The Government next contends that review is unwarranted because "the court of appeals' reliance on the distinction between intrinsic and extrinsic influences was proper whether or not Rule 606(b) applies." Opp. 13. Whatever the merits of that argument, it is irrelevant to whether the petition should be granted. The question presented by the petition is *not* whether "district courts have correspondingly greater discretion to decline to conduct an investigation of intrinsic influences than they do with respect to extrinsic influences." Opp. 11-12. At issue here is whether the court of appeals correctly concluded that the district court had *no* discretion to investigate pre-verdict allegations of juror misconduct "*under Rule 606(b)*." Pet. 17a (emphasis added).

Indeed, even if the Government were correct that pre-verdict claims of juror misconduct are governed by a rule of "discretion," reversal would be required, because *no* court has exercised its "discretion" in this case. Both the district court and Eleventh Circuit believed that *no* investigation *could* be conducted given that Rule 606(b) bars testimony on matters "entirely endemic to the deliberations." Pet. App. 7a. Accordingly, whatever "discretion" the Government now believes the district court *might* have had to decline to investigate the juror misconduct was not exercised (one way *or* the other), because the district court believed that under Rule 606(b) it had no authority to investigate at all.

Where, as here, both the district court and court of appeals analyzed the scope of the district court's power on the basis of an erroneous legal premise, this Court's cases preclude the Government's argument that "discretion" was properly exercised in any event. *See Koon v. United States*, 518 U.S. 81, 100 (1996) (a court "by definition abuses its discretion when it makes an error of law"); *Cooter & Gell v. Hartmarx Corp.*,

496 U.S. 384, 405 (1990) (same).[1] The Government's failure even to cite, much less adequately distinguish, *Koon* and *Cooter & Gell*—both of which are fatal to the Government's theory of "discretion"—is telling.

3. Finally, the Government contends that review is unwarranted because no circuit conflict exists regarding Rule 606(b)'s applicability to claims of juror misconduct that come to light before a verdict has been returned. That argument is predicated not only on the Government's wholly indefensible reading of the decisions below—which treats those decisions as though they never so much as mentioned Rule 606(b)—but also on equally contrived interpretations of the decisions of other circuits that agree with the Eleventh Circuit's erroneous interpretation of Rule 606(b).

As a threshold matter, not even the Government disputes that the Third, Fifth, and Seventh Circuits have recognized

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[1] It is far from clear, in any event, that at the merits stage the Government could successfully defend the proposition that district courts have *more* discretion to refuse to investigate claims of internal misconduct brought to light before a verdict than they do to investigate extrinsic ones. When enacting Rule 606(b), Congress encouraged jurors "to be conscientious in promptly reporting to the court misconduct that occurs during deliberations," because it recognized that post-verdict testimony on such matters would be barred by the Rule. *See* Advisory Committee's Notes to Subdivision (b), FED. R. EVID. 606(B). For the same reason, this Court in *Tanner v. United States*, 483 U.S. 107 (1987), invited jurors to "report inappropriate juror behavior to the court *before* they render a verdict." *Id.* at 127 (emphasis in original). Several courts have recognized the need for prompt reporting and investigation of pre-verdict intrinsic misconduct because post-verdict reports come "too late." *See United States v. Stafford*, 136 F.3d 1109, 1113 (7th Cir. 1998). Because Rule 606(b) effectively places the effect of improper internal influences beyond judicial review once a verdict is returned, a district court bears a special duty to investigate such allegations as soon as they are reported.

that Rule 606(b) is inoperative when claims of juror misconduct are brought to light before a verdict is returned. The Government submits, however, that neither the Sixth nor the Tenth Circuit has held that Rule 606(b) applies to pre-verdict claims of juror misconduct. Even if the Government were correct in its reading of the Sixth and Tenth Circuit authorities, certiorari would nonetheless be warranted to address the conflict created by the Eleventh Circuit in this case. In any event, the Government's reading of the cases from the Sixth and Tenth Circuits owes more to wishful thinking than to any cogent legal analysis.

According to the Government, *United States v. Herndon*, 156 F.3d 629 (6th Cir. 1998), "did not hold that Rule 606(b) bars pre-verdict inquiries into instances of internal misconduct." Opp. 13. That, however, is an entirely insupportable interpretation of *Herndon*. At issue in *Herndon* was whether the district court properly declined to investigate claims of juror misconduct brought to light during deliberations. The Sixth Circuit explained that to resolve that issue "we *must* . . . determine whether the influence on [the] juror . . . was internal or extraneous"—and cited to and quoted Rule 606(b) in full. 156 F.3d at 634. The *entirety* of the Sixth Circuit's discussion of "internal" and "external" influences was—as the Government must surely recognize—directed to determining whether the juror misconduct at issue ran afoul of that quoted rule. Like the Eleventh Circuit in this case, the Sixth Circuit quoted from, and relied on, Rule 606(b) because the court believed that Rule controlled the court's analysis, not because it was an interesting aside.

Similarly unavailing is the Government's attempt to recharacterize the Tenth Circuit's settled rule that Rule 606(b) applies to allegations of internal misconduct raised during deliberations. *See United States v. Davis*, 1 F.3d 1014 (10th Cir. 1993). The Government suggests that *Davis* merely "mention[s]" Rule 606(b), and contends that "the [*Davis*] court did not say . . . that Rule 606(b) applies to inquiries conducted before [a] verdict." Opp. 14. That,

however, is precisely what *Davis does* say. *See Davis*, 1 F.3d at 1016 ("[i]nquiry into such matters, *within the limitations of Rule 606(b)* . . . is the appropriate method of developing such allegations") (emphasis added). The Government either has not read *Davis* or has understood it exactly backward.[2]

II. The Courts Of Appeals Are Divided Regarding The Permissibility Of The Supplemental Jury Charge.

1. The Government's attempt to deny the existence of a circuit conflict on the *Allen*-charge question is no more convincing than its argument that no conflict exists with respect to the scope of Rule 606(b). The Government contends that cautionary language reminding jurors of their right to adhere to their sincerely-held beliefs is a necessary component of a supplemental charge *only* when the supplemental charge contains features that render the charge "otherwise . . . coercive." Opp. 19. The Government submits that no circuit conflict exists regarding the propriety of the jury charge given in *this* case because (1) the district court instructed the jurors to adhere to their sincerely-held beliefs in its *initial* charge to the jury; and (2) no additional coercive elements were present. According to the Government, the several cases cited as conflicting authorities in the petition "are all distinguishable" for those reasons. *Ibid.*

The Government's argument is wholly unpersuasive. The Government cites to no case, nor is petitioner aware of any, that holds that the curative component of an *Allen*-charge is unnecessary where the trial court instructed jurors to adhere to their sincerely-held views before the jury retired to deliberate. To the contrary, the courts of appeals have

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[2] The Government also goes to great lengths to suggest that prior to the decision below the Eleventh Circuit "recognize[d] that trial courts *do* have discretion to interview jurors about intrinsic influences . . . notwithstanding Rule 606(b)." Opp. 10. That claim—even if correct—is entirely irrelevant, given the direct conflict posed by the decision in *this* case with the decision of several other circuits.

recognized, as has this Court, that cautionary language is essential precisely because the *Allen*-charge is a response to jury *deadlock*, which by definition implicates constitutional considerations that are not present when the first charge to the jury is delivered. *See Burton v. United States*, 196 U.S. 283, 307 (1905). Moreover, the Government's position makes little logical sense, because it essentially would place beyond judicial review *any* supplemental anti-deadlock charge, no matter how coercive, provided the trial court in its original instructions properly advised jurors, as courts presumably do in *all* cases, to adhere to their sincerely-held convictions.

Equally unavailing is the Government's effort to invent additional "coercive" features in the supplemental charges at issue in each of the cases cited by the petition that require cautionary language to be included in an *Allen*-charge. The Government's discussion of *Smalls v. Batista*, 191 F.3d 272 (2d Cir. 1999), is emblematic of this approach. The supplemental charge in *Smalls* is virtually identical to the supplemental charge given by the district court here. *See* 191 F.3d at 274-75 (quoting trial court's instruction to "go back and again discuss this amongst yourselves" and "continue a free discussion"). As does the Government here, the prosecutor in *Smalls* defended the instruction on the ground that it "never urged the jury to reach a verdict, but rather ordered them only to continue to deliberate, argue and discuss." *Id.* at 279. Nonetheless, the Second Circuit, sitting in habeas, reversed the defendant's conviction, holding that "*any Allen*-type charge" *must* contain "cautionary language which would discourage jurors from surrendering their own conscientiously held beliefs." *Ibid.* (emphasis added). *Smalls* expressly stated that the lack of cautionary language in the supplemental charge was its "fatal flaw." *Ibid.*

The Government breezes over these passages and reads *Smalls* as having been based on several other facts, including that "the jury knew that the judge was aware of the nature of the division." Opp. 19. But the Government's view is belied

by the express holding of the court: "It is this lack of cautionary language . . . that renders the charge coercive and a violation of Smalls' constitutional rights to due process and a fair trial." 191 F.3d at 280. Although the Second Circuit *did* recognize that other features of the charge may have contributed to its coercive power—including the fact that the court was aware of the jury's numerical division—it took pains to point out that "the charge was rendered coercive not so much for what it contained but for what it *failed* to contain . . .[,] the absence of cautionary language." *Ibid.* (emphasis added). The Government's attempt to distinguish *Smalls* is meritless; *Smalls* squarely conflicts with the decision of the Eleventh Circuit below.[3]

The Government's rendition of cases from other circuits is equally inapt. The Government does not so much as cite the First Circuit's decision in *United States v. Hernandez-Albino*, which ruled—contrary to the paradigm invented by the Government for its brief in this case—that "*[a]ny* supplemental instruction which urges the jury to return to its deliberations *must* include" language conveying to the jury that it has "the right not to agree." 177 F.3d 33, 38 (1st Cir.

[3] The Government contends that this case is unlike *Smalls* because the judge was unaware of the jury's nascent verdict and the jury had no reason to suspect the judge was aware of its numerical division. Opp. 17 n.7. That is simply not correct. Juror Huffman, the dismissed alternate, informed the district court that the jury was divided 10-2. Pet. App. 50a. Moreover, juror Budd—who petitioner contends compromised her verdict after the court's supplemental charge—undoubtedly knew that the district court was aware of the jury's nascent verdict because the day after she disclosed that information to the dismissed alternate the district court strongly admonished the jury to speak "with no one outside the jury." *Ibid.* If the charge in *Smalls* was coercive because the jury was "aware[] of [the district court's knowledge]" of the jury's nascent verdict, the charge given here must be said to have been coercive on that basis as well. Opp. 17 n.7. As noted in the text, however, the Second Circuit did not rely upon that fact in reversing Smalls' conviction.

1999) (emphases in original). The Government's characterization of cases cited by petitioner from the Fourth, Sixth, and Ninth Circuits—all of which also require cautionary language to be given in *any Allen*-type charge—is misleading. Opp. 21 (reviewing *United States v. Mason*, 658 F.2d 1263 (9th Cir. 1981); *United States v. Scott*, 547 F.2d 334 (6th Cir. 1977); *United States v. Rogers*, 289 F.2d 433 (4th Cir. 1961)). None of those decisions is based on any of the "coercive" features the Government now asserts to have been essential to each. Instead, those cases endorse the proposition that cautionary language is required virtually *every time* a trial court instructs a deadlocked jury to "continue deliberating," because the message conveyed to the jury in such circumstances is inherently coercive—*i.e.*, that deadlock is unacceptable, and that a verdict *must* be produced.[4]

In short, the Eleventh Circuit's decision squarely conflicts with *Smalls* and with the decisions of the First, Fourth, Sixth, and Ninth Circuits, and comports with the prevailing rule in the Fifth and Seventh Circuits. Review by this Court is necessary to restore uniformity to this important area of federal criminal procedure.

III. The Decision Below Departs From The Established Interpretation Of Counterfeiting Statutes.

The Government's opposition entirely fails to address, much less refute, the central claims in support of review of

[4] *See Mason*, 658 F.2d at 1268 ("It is essential in almost all cases to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party"); *Scott*, 547 F.2d at 337 ("[t]he reminder that no juror should merely acquiesce in the majority opinion is therefore one of the most important parts of the *Allen* charge"); *Rogers*, 289 F.2d at 437 ("When the moderating condition which makes [the supplemental charge] permissible . . . is omitted, then the direction becomes so likely to be coercive, that a verdict rendered promptly thereafter should not be allowed to stand").

the court of appeals' construction of section 513: its departure from the rule concededly followed by "virtually every court of appeals" (Pet. App. 10a) that counterfeiting statutes require a finding of "similitude"—a rule that is required by the courts' duty to construe federal statutes in accordance with common law principles (Pet. 27)—and its substantial interference with Congress' carefully-crafted enforcement scheme by rendering another statute (18 U.S.C. § 514) essentially superfluous.

The essence of the Government's position—wisely consigned to a footnote—boils down to the proposition that petitioner is improperly attempting to rely on legislative history that accompanied Section 514 that merely reflects "the views of [a] single Senator." Opp. 24-25 n.10. That is not so. Aside from emphasizing the *conceded* departure from the established interpretation of counterfeiting statutes (Pet. App. 10a), petitioner relies on *a subsequently enacted statute* that explicitly addresses the conduct in which petitioner is said to have engaged, and which obviously is far more significant to statutory interpretation than the "views of a subsequent Congress." Opp. 25 n.10. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 9 (1967).

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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